88-988

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TOWNLEY MANUFACTURING CO., INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause of the First Amendment exempt the religious activities of a for-profit corporation from governmental interference under Title VII of the Civil Rights Act of 1964?

2. Does Section 701(j) of Title VII of the Civil Rights Act of 1964 require a for-profit corporate employer to accommodate an employee's atheistic beliefs by excusing the employee from attending devotional services conducted by the employer for all employees during paid work hours where the employer's Christian owners and founders believe such accommodation would create a spiritual undue hardship in carrying out the employer's primary religious purpose and where reasonable accommodation had already been achieved?

3. Is the Section 702 "Religious Corporation" exemption under Title VII of the Civil Rights Act of 1964 available to a for-profit manufacturing corporation whose Christian owners believe has a primary religious mission which includes various forms of religious expression?

DESIGNATION OF CORPORATE RELATIONSHIPS

Townley Manufacturing Co., Inc., filing this Petition for Writ of Certiorari in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Townley Manufacturing Co., Inc. is not owned by any parent corporation.

Townley Manufacturing Co., Inc. does not have an ownership interest in any subsidiaries.

The only affiliates of Townley Manufacturing Co., Inc. are Townley Foundry & Machine Co., Inc., Town-I-Flex Hose Manufacturing Co., Inc. and Townley Manufacturing Co. of Texas, Inc. These companies are affiliated with Townley Manufacturing Co., Inc. by virtue of their ownership by J. O. Townley and Helen Townley.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

TOWNLEY ENGINEERING AND MANUFACTURING CO.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Townley Manufacturing Co., Inc., prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 859 F.2d 610 (9th Cir. 1988) and is reprinted in Appendix A. The District Court's Order of May 11, 1987 is reported at 675 F.Supp. 566 and is reprinted in Appendix B. The District Court's unpublished Findings of Fact and Conclusions of Law and Order for Judgment and Permanent Injunction of the District Court is reprinted in Appendix D.

JURISDICTION

The Court of Appeals issued its opinion (Appendix A) on September 19, 1988 and filed its judgment for record on October 11, 1988 (Appendix B). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and portions of the 1964 Civil Rights Act, as

amended, are set forth in Appendixes G and H respectively.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

The Equal Employment Opportunity Commission ("EEOC") brought an action against Townley Manufacturing Co., Inc. ("Townley") in July, 1986, under Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. 2000e-5(f)(1) and (3). The Complaint alleged Townley violated Section 703(a), by: (1) implementing a policy of requiring all employees to attend a company sponsored non-denominational weekly devotional services during their paid work-time; (2) failing to accommodate Louis Pelvas' objection to attending the devotional services; and (3) constructively discharging Mr. Pelvas by offering him a transfer to another facility where the mandatory devotional services policy was also in effect. The EEOC filed the action in the United States District Court for Arizona because Townley operates a small manufacturing plant in Eloy, Arizona where Louis Pelvas was employed.

On May 11, 1987, the District Court (per Judge Earl H. Carroll) entered Summary Judgment in favor of the EEOC. The District Court concluded Townley had engaged in unlawful employment practices and issued a permanent injunction prohibiting Townley from "continuing mandatory devotional exercises for its employees at its Eloy, Arizona plant". The District Court denied Summary Judgment on the constructive discharge claim because the District Court believed material issues of fact remained. Townley appealed the Summary Judgment Order and Injunction to the Ninth Circuit Court of Appeals in June, 1987.

In December, 1987, District Judge Earl H. Carroll conducted a bench trial on the constructive discharge issue. On April 21, 1988, the District Court found Townley had not constructively discharged Louis Pelvas; how-

ever, pursuant to a Petition to Show Cause brought by the EEOC on the eve of trial, the District Court found Townley in contempt of the Court's May 11, 1987 injunction prohibiting mandatory attendance devotional services, assessed a $10,000.00 fine against Townley and ordered a fine of $10,000.00 each be imposed upon Townley and its President for any future violations of the injunction and ordered Townley not to hold any further devotional services in any of its plants until a devotional services plan was approved by the District Court. Townley filed for an emergency appeal and sought a stay of the April 21, 1988 Order and Injunction of the District Court.

B. Proceedings in the Court of Appeals.

On April 25, 1988 the Court of Appeals stayed the District Court's April 21, 1988 Order, pending an appeal of that Order by Townley. Townley's appeal of the District Court's April 21, 1988 contempt citation is still pending before the Ninth Circuit.

On September 19, 1988, the Court of Appeals for the Ninth Circuit entered its Opinion affirming in part and reversing in part the District Court's May 11, 1987 Order. The Court of Appeals remanded the case to the District Court for reissuance of an injunction which would be consistent with the Court of Appeals' Opinion.

C. Facts.

Townley is a closely-held corporation organized under the laws of the State of Florida and is controlled and managed by J. O. (Jake) Townley and Helen Townley, his wife, who own approximately 94% of the outstanding common stock of Townley. When they founded the company in 1963, Jake and Helen Townley made a covenant with God that their business would be a "faith-operated business whose primary purpose would be to share the Gospel of the Lord Jesus Christ and to remain completely dedicated to God's service". [Opinion of the Ninth Circuit at A-1; dissenting opinion at A-30a].

Jake and Helen Townley are born again believers in the Lord Jesus Christ and they are unable to separate God from any portion of their daily lives, including their activities at the Townley Company. "As part of the covenant with God, they (Townely's) agreed 'to acknowledge God's blessing upon the business and His continued direction of the business and His use of the business'. The fundamental purpose of the company is 'to stand as a testimony to God's blessing to all persons who will operate their business according to Christian principles' ". [Opinion of Ninth Circuit, dissenting opinion at 30a]. In furtherance of Townley's covenant with God, the company conducts weekly non-denominational devotional services for their employees during work hours. The company also reflects its founders' covenant with God in several other ways, including enclosure of a Gospel tract in every piece of outgoing mail, the printing of Bible verses on all company invoices, purchase orders and other commercial documents and by giving financial support to various churches and missionaries. [Opinion of the Ninth Circuit at A-2a-3a].

Townley's non-denominational devotional services are conducted on a weekly basis and occur within the shop facilities during paid work-time. Typically, the services last between 30 to 45 minutes. The devotional services have been conducted for all of Townley's employees at its Florida plant, the Townley's original facility, during paid work-time for approximately 25 years. While Townley does not maintain a set agenda, the typical non-denominational devotional service conducted for employeeys during their paid work-time includes prayers, thanksgivings to God, singing, testimony, Scripture reading, as well as discussion of safety, quality and production matters. [Opinion of the Ninth Circuit at A-3a].

Louis Pelvas was employed by Townley on November 1, 1979 as a machinist for Townley at its Eloy, Arizona plant. In December, 1982, Townley developed an employee handbook which contained the company's policies

and rules, including the requirement that all employees are required to attend the non-denominational devotional services each Tuesday. Employees are paid for their time while attending these services. Louis Pelvas read the handbook and signed the employee handbook agreement on December 12, 1982 agreeing to "abide by all of the requirements and policies stated within the handbook, as a condition of my continued employment with Townley". [Opinion of the Ninth Circuit at A-3a].

In April of 1984, Townley implemented its policy of conducting non-denominational devotional services for its Eloy, Arizona plant employees during their paid work-time. Louis Pelvas attended these devotional services without complaint until June, 1984, when he asked to be excused from the services because he was an atheist. [Opinion of Ninth Circuit at A-3a]. Louis Pelvas was told by the Plant Superintendent that attendance was mandatory, but that Louis Pelvas could wear earplugs, read a book or sleep in the devotional services. [Opinion of the Ninth Circuit, dissenting opinion at A-24a].

Louis Pelvas continued to attend the devotional services; however, in October, 1984, Louis Pelvas filed a charge of religious discrimination with the Equal Employment Opportunity Commission. In December, 1984, Pelvas refused a transfer of his employment to Townley's Florida plant. Immediately thereafter, Pelvas filed an additional charge of constructive discharge with the EEOC. The District Court found in its April 21, 1988 Order that Louis Pelvas was not forced to quit because of intolerable and discriminatory working conditions. [Findings of Fact of the District Court at A-57a].

REASONS FOR GRANTING THE PETITION

This Petition should be granted because the decision of the Court of Appeals involves important questions of constitutional and federal law regarding a case of first impression which should be settled by this Court. Simply stated, the case will affect many privately held businesses

in the United States which are owned and operated by Bible believing Christians who view their businesses as an extension of their Christian witness. Unless this Court upholds the constitutional and statutory right of employer's to operate their businesses in accordance with their sincerely held religious beliefs, the private workplace will increasingly become void of religion as a result of governmental entanglement and persecution. This result was never intended by Congress or the Framers of our Constitution.

In the case below, the Ninth Circuit acknowledges the application of Title VII to Townley's policy of conducting devotional services for its employees during paid worktime "would give rise to serious constitutional questions". [Opinion of Ninth Circuit at A-5a, *citing N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979)]. Nevertheless, the Court of Appeals, with Judge Noonan dissenting, rejected Townley's Free Exercise claim and held where the religious practices of the employer and employee conflict, "it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its Free Exercise rights, if any, to accommodate the employee's Title VII rights", [Opinion of Ninth Circuit at A-22a]. As a result, the Free Exercise Clause must yield to a Congressional mandate. Judge Noonan stated in his dissent this result is remarkable and regrettable.

> [W]here the Free Exercise claim has been pressed and the federal statute not glossed, the result has not been good for Free Exercise. School boards, municipalities, states have been subjected to the standard set by the Religion Clauses. When Congress has legislated, the legislative objective has overborne the claims of conscience.

[Opinion of Ninth Circuit; dissenting opinion at A-28a].

In a survey of the Free Exercise cases which have come before the Supreme Court, Judge Noonan reports

in nineteen cases[1] this Court has upheld Congressional legislation in the face of the Free Exercise Clause. Judge Noonan further states:

> Remarkably and regrettably when Congress has found a national interest to be of sufficient importance to be incorporated into Federal legislation and that legislation has conflicted with the free exercise of religion, the Supreme Court of the United States has uniformly found the national interest to outweigh the claims of conscience and permitted Congress to prohibit the free exercise of religion in conflict with the legislation. This bleak record is mitigated because the Court has sometimes reinterpreted a federal statute to accommodate the Free Exercise claim. *E.g., United States v. Seeger*, 380 U.S. 163 (1965); *Giruoard v. United States*, 328 U.S. 61 (1946). *Id.*

The Ninth Circuit also rejected Townley's arguments that it is exempt as a religious corporation under Section 702 of Title VII and rejected Townley's claim that accommodating Louis Pelvas' atheistic beliefs by excusing him from the devotional services would constitute an undue spiritual hardship on the religious mission of the Townley Company.

In essence, the Ninth Circuit's decision failed to appreciate the uniqueness of Townley Manufacturing Co. and its special religious mission which exists despite its for-profit corporate status. The First Amendment does not require the separation of religious expression from the private workplace, a task which would be impossible for Townley. As Judge Noonan aptly puts it:

> Respect for the religious beliefs of others is particularly difficult when one does not share these beliefs. . . . The agency and the court appear to

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[1] A complete summary of Free Exercise cases before the Supreme Court and Courts of Appeal is set forth in the Appendix to Judge Noonan's dissent.

> assume that there must be a sharp division between secular activity and religious activity. . . . The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time. Such a split is attractive to some religious persons. It is repudiated by many, especially those who seek to integrate their lives and to integrate their activities. Among those who repudiate this theology is the Townley Manufacturing Company.

[Opinion of the Ninth Circuit, dissenting opinion at A-29a-30a].

Thus, the Petition should be granted for the following reasons: 1) Since the scope of what constitutes a "religious corporation" under Section 702 of Title VII has never previously been decided, this Court should review the too narrow interpretation of the Section 702 religious corporation exemption by the Ninth Circuit in this case; 2) The decision of the Court of Appeals regarding Townley's obligation to accommodate the atheistic beliefs of an objecting employee has the effect of subordinating Townley's Free Exercise rights under the Constitution to an employee's statutory rights under Title VII with the resulting effect that Townley's and other private employers' expression of their religious belief in the workplace will undoubtedly be chilled, curtailed and possibly eliminated; 3) The question of whether a corporation has the right to Free Exercise of religion under the First Amendment is not an abstract issue as suggested by the Ninth Circuit. Rather, it is an important constitutional question which should be resolved by this Court. Also, the burden of Title VII on Townley's right of Free Exercise of religion is great and the Ninth Circuit's limitation of Townley's Free Exercise rights in this case is not essential to accomplish the government's interest in eradicating religious discrimination under Title VII.

I. Townley Qualifies as a "Religious Corporation" Under the Section 702 Exemption of Title VII.

In its Order granting Summary Judgment for the EEOC, the District Court ruled that "any reasonable construction of the (Section 702) exemption would not include a for-profit corporation whose only religious characteristic is a belief of stockholders" [Opinion of District Court at A-45a]. The District Court also concluded even if Townley is a religious corporation, "the relationship between the job performed by Pelvas and the 'religious tenets' is insufficient to support a religious activities exemption". [*Id.*] In reaching its conclusion, the District Court relied upon the Utah District Court decision in *Amos v. Corporation of Presiding Bishop*, 594 F.Supp. 791 (D. Utah 1984 [*Amos I*] and 618 F.Supp. 1013 (D. Utah 1985) [*Amos II*]. *Amos I* and *II* were reversed by this Court approximately one month after the District Court issued its May 11, 1987 Order in this case. *See, Corporation of Presiding Bishop v. Amos*, —— U.S. ——, 107 S.Ct. 2862 (1987) [*Amos*]. In reversing the Utah District Court, this Court in *Amos* held all nonprofit activities of religious corporations are exempt from Title VII. This Court did not decide whether for-profit activities would be exempt; however, in Justice Brennan's and Marshall's Concurring Opinion this Court suggested that the exemption could be extended to for-profit activities with a religious character in some cases. *Id.* at 2873, fn. 6.

The Ninth Circuit substantially concurs with the District Court's narrow interpretation of the religious corporation exemption. The Court of Appeals adopted a "primary purpose" restriction to the application of the exemption and at the same time concluded that, "the beliefs of the owners and operators of a corporation are simply not enough in themselves to make a corporation 'religious' within the meaning of Section 702". [Opinion of Ninth Circuit at A-19a].

In its "primary purpose" analysis of the Townley Company, the Ninth Circuit ignores the uncontroverted testimony of Jake and Helen Townley that the primary religious mission of Townley is that it would be operated as a Christian, faith-operated business which would share the Gospel of the Lord Jesus Christ with all of its employees and would remain completely dedicated to God's service. The numerous forms of religious expression conducted by Townley in order to carry out its primary religious purpose, including Gospel tracts and outgoing mail, Bible verses on commercial documents, financially supporting churches, missionaries, a prison ministry, Christian radio broadcasts and the weekly non-denominational devotional services for its employees, all are supportive of the conclusion that Townley is indeed a religious corporation. The basic thrust of the Ninth Circuit's reasoning is that since Townley is a corporate entity which manufactures mining equipment, the religious beliefs of Townley's owners and founders are not sufficient to grant the exemption.

The Ninth Circuit's extremely narrow interpretation of the religious corporation exemption of Title VII is not substantiated by either case law or by an examination of the legislative history of the Section 702 exemption. It is reasonable to conclude that Congress adopted the Section 702 religious corporation exemption as a statutory recognition of the rights granted under the Free Exercise Clause of the First Amendment. *See, King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 56 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974). However, an examination of the case law involving the application of the Section 702 exemption reveals none of the courts have defined what a "religious corporation" is within the context of Section 702. *Cf., Amos, supra, EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981);

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972); *Ritter v. Mt. St. Mary's College*, 495 F.Supp. 724 (D. Md. 1980); *Fike v. United Methodist Children's Home*, 493 F.Supp. 935 (E.D. Va. 1980); *EEOC v. Southwestern Baptist Theological Seminary*, 485 F.Supp. 255 (N.D. Texas 1980), *aff'd in part*, 651 F.2d 277 (1981), *cert. denied*, 456 U.S. 905 (1982).

Congress did not exclude for-profit corporations from the religious corporation definition of Section 702. The purpose of the Section 702 exemption adopted by Congress was to "take the political hands of Caesar off the institutions of God where they have no place to be", 118 *Cong. Rec.* 4503 (1972) (remarks of Senator Ervin). In adopting Section 702, Congress, in effect, instructed the EEOC not to entangle itself with the religious tenets and activities of a religious corporation in the name of employment discrimination. Townley submits this is exactly what the EEOC has done in the Townley case.

Townley's sterile incorporation papers should not be determinative of the actual purpose for which the corporation is formed and operated. Rather, the examination of actual purpose should include a comparison of the stated religious beliefs and tenets of a company and the religious activity of the company throughout the history of the organization. In the area of federal taxation, as an example, this Court has announced the superiority of substance over form by recognizing the "importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment", *United States v. Phellis*, 257 U.S. 156, 168 (1921).

The essence of the Townley Company is the discipleship Jake and Helen Townley have for the Lord Jesus Christ. The manufacture and sale of mining equipment is an important aspect of the business in that it provides the profits through which the company maintains its Christain mission and secures the blessings of its owners, employees and others. However, the manufacture and sale

of Townley's products are not the paramount purposes for which the company has been continued. To understand the significance of the devotional service and its relationship to the actual purpose of the Townley Company, it is necessary to comprehend that Mr. and Mrs. Townley are not able to separate God from their daily lives. All of their actions and speech, whether they are at home or at their business, are under the divine guidance of God's holy spirit which resides within them.

Townley's devotional service is in fact a "religious activity" which is closely tied to the principal purpose and religious mission for which Townley was founded. The principal purpose and mission of Townley is to operate as a witness for the Lord Jesus Christ. Devotional services for its employees are a fundamental part of the expression of the religious beliefs of Mr. & Mrs. Townley and the Townley Company. Mr. and Mrs. Townley's covenant with God is dependent upon their ability to share the Gospel freely and openly with those who are in contact with the business. Therefore, granting the Section 702 exemption to Townley would alleviate significant governmental interference with the ability of Townley as a religious organization to define and carry out its religious mission. *See, Amos, supra* at 2870.[2] Of course,

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[2] The Ninth Circuit noted that if it held Townley was a "religious corporation" under the meaning of Section 702, the court might be faced with a question the Supreme Court left open in *Amos*; whether exemption of a religious corporation's for profit activities violates the Establishment Clause. *Amos, supra,* at 2875 (O'Connor, J. concurring in the judgment). [Opinion of Ninth Circuit at A-5a f.n. 2].

Townley submits the "activity" in question at Townley is its religious expression and not its manufacturing activity. Therefore, Townley contends the application of the Section 702 exemption to a religious activity of a for-profit religious corporation would no more violate the Establishment Clause then does the application of the exemption to secular non-profit activities. In *Amos, supra,* this Court conducted an Establishment Clause analysis under the tests of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and concluded the second requirement under the *Lemon* test ("a principal or primary effect . . . that neither advances or inhibits religion" *Id.*

Townley is still subject to Title VII's prohibition of other forms of discrimination in the workplace.

In summary, Townley submits the facts amply demonstrate Townley is in fact a religious corporation under Section 702 and Townley genuinely reflects the consistent and sincerely held religious beliefs and tenets which were embodied in its original founding purpose and which have been mirrored in its activities since the inception of the business for the last 25 years.

II. Section 701(j) of Title VII Does Not Require Townley to Excuse an Objecting Employee from the Devotional Services Because of the Undue Hardship Which Would Result on Townley's Religious Mission and Because Reasonable Accommodation Had Been Achieved.

Generally, an employer must accommodate an employee's religious belief or lack thereof, unless an employer

> . . . demonstrates that (it) is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business. Section 701(j), Civil Rights Act of 1964; 42 U.S.C. § 2000e(j).

Firstly, Townley maintains it is a religious corporation and is exempt from accommodation requirements under Section 702 of Title VII. Secondly, even assuming, arguendo, Townley is not a religious corporation under Section 702, Townley would not be required to further accommodate an objecting employee's atheistic beliefs be-

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at 612.) is not violated unless "*the government itself* has advanced religion through its own activities and influence", *Amos, supra* at 2869.

To allow Townley to carry out its religious mission under the Section 702 exemption would not constitute the establishment of a religion by the government. The third prong of the Lemon test is also satisfied in the instant case since Section 702 does not impermissibly entangle the government with the religious affairs of Townley. As in *Amos, supra,* Section 702 has the effect of removing the government from interpreting the religious tenets of Townley and making determinations as to how Townley may otherwise carry out its religious mission.

cause an accommodation of potentially conflicting religious beliefs between Townley and its employees has already been achieved by the employees' voluntary agreement to attending devotional services when they executed the signature page of the employee handbook. Thirdly, Townley has met the reasonable alternative requirements of Section 701(j) by allowing an objecting employee to disassociate himself from the devotional services by listening to a radio, reading a book or sleeping. As pointed out by Judge Noonan in his dissent in the case below, Townley had accommodated Louis Pelvas by allowing Pelvas "to disassociate himself in the most public way from the devotional services that were conducted." He was allowed to turn off and shut off the inspirational message. [Opinion of the Ninth Circuit, dissenting opinion at A-25a]. Lastly, requiring further accommodation by excusing an objecting employee from the devotional services would interfere with and directly frustrate the religious mission of the Townley Company and would result in spiritual "undue hardship" to Townley. *See, Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (Accommodation causes undue hardship whenever that accommodation results in "more than the de minimis cost to the employer") and *Ansonia Bd. of Ed. v. Philbrook*, —— U.S. ——, 107 S.Ct. 367, 372 (1986) (When an employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is therefore at an end).

In regard to the employees' written agreement, the Townley Employee Handbook contains a description of Townely's devotional services policy on page one of the handbook, as follows:

> "*Devotional Services*:
>
> All Employees Are Required To Attend The Non-Denominational Devotional Services Each Tuesday. Employees Are Paid For Their Time While Attending These Services."

Each employee has read the employee handbook and has agreed in writing to abide by all company policies, including attending the devotional service. Louis Pelvas signed his employee handbook December 12, 1982.

The Court of Appeals accurately points out Townley did not institute devotional services in its small Eloy, Arizona plant until April, 1984. But that fact alone should not be determinative in view of uninterrupted continuity of the devotional services as a policy of the company since Townley's inception in 1963. All of Townley's other forms of religious expression involved the Eloy plant since it was built and when Mr. and Mrs. Townley believed the Eloy plant was ready for the devotional services, the devotional program was instituted.

Townley strongly maintains it should be able to rely on the employees' written agreement to attend the devotional services at the Townley plants. There is no evidence in the record indicating execution of the employment agreement was involuntary or otherwise coercive. The Court of Appeals correctly states that while, generally, there can be no prospective waiver of Title VII rights, voluntary settlement agreements can be entered into between an employer and an employee wherein the employee waives rights he or she may have under Title VII. *See, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974). By consenting to attending the devotional services in their written agreement, Townley's employees recognize Townley's right to exercise its religious beliefs within the workplace in the form of devotional services.

Townley's employees are not forced to believe any of the religious tenets of Townley as a condition of their continued employment. "No such showing of coercion has been made". [Opinion of the Ninth Circuit, dissenting opinion at A-24a]. Accommodation of possible conflicting religious beliefs of its employees and Townley occurs when the employees execute the agreement, thereby waiving their right to object to attending devotional services. *See, Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66

(6th Cir. 1982) (An employee was not "discharged" illegally under the Age Discrimination Employment Act because the employee had signed an agreement with his employer to take early retirement).

Townley submits there exists a valid public interest in allowing religious corporations like Townley to express their religious beliefs and tenets within the workplace as long as disclosure has been made to the employee. Accordingly, employees should be capable of voluntarily waiving their personal accommodation right under Section 701(j). The waiver of such right by an individual knowingly and voluntarily should not be deemed to be violative of public policy where bona fide religious expression by the employer is at stake.

Even if Townley's employment agreement is not an effective waiver of Title VII rights, Section 701(j) does not require Townley to excuse employees such as Louis Pelvas from the devotional services because Townley has already reasonably accommodated such objections to the services. Townley's employees are not coerced into practicing religion or into giving up their religious beliefs. As Judge Noonan correctly states in his dissent regarding Louis Pelvas' accommodation, by wearing earplugs Pelvas "was not exposed to hearing a word of doctrine subversive of his atheism. Reading a book or sleeping, he was not participating in any form of worship." [Opinion of Ninth Circuit, dissenting opinion at A-24a]. Judge Noonan concludes Townley Manufacturing Company had already accommodated Pelvas' conscientious unwillingness to participate in its services and Townley did not penalize or even ostracize Pelvas for such behavior. *Id.* Therefore, the statutory inquiry under Section 701(j) is complete. *See, Ansonia, supra.*

To require Townley to further accommodate an objecting employee's atheistic beliefs by excusing him from the devotional services would frustrate its fundamental organizational purpose and would contravene the religious tenets of Townley. The right of Townley to share with

all of its employees the spiritual aspects of the company as a part of its religious mission is at stake. The frustration of this religious mission is clearly more than a "de minimis cost". However, the Court of Appeals held the infliction of spiritual costs on the company or on Jake and Helen Townley, is not enough. [Opinion of Ninth Circuit at A-10a]. Rather, the Court of Appeals states Townley must connect the asserted spiritual hardship to an adverse impact on the conduct of the business. Additionally, the Court concluded to "chill" Townley's religious purpose is "irrelevant if it has no effect on its economic wellbeing". [*Id.* at A-11a].

In *Amos, supra*, this Court said "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Amos, supra* at 2868. Mr. and Mrs. Townley are unable to separate the worship of God from their business. Since they are under the Biblical command to allow God's Holy Spirit to operate in all aspects of their lives, including how their company is operated, it would be unduly burdensome for the Townleys to be required to further accommodate an employee's religious objection to devotional services because religious expression at Townley is not confined to devotional services, but it permeates the entire company. Townley is not able to provide a religiously neutral environment to accommodate atheism. Therefore, accommodation beyond what was provided to Louis Pelvas as a result of his atheistic based objection to religious expression at Townley, for instance, is not only unreasonably burdensome, it is impossible.

Townley's employees' rights under Title VII have not been infringed because employees are not hired by Townley on the basis of their religious beliefs, nor are they forced to believe any of the religious tenets of the Townley Company as a condition of their continued employment.

If requiring a religious objector to attend devotional services at Townley is unlawful under Title VII, the

question then becomes what is a permissible form of religious expression by a Christian employer in the workplace which would not require segregating the objector. Is being present at the workplace where Gospel music is played on the company intercom any less "mandatory" for the employees within hearing range than attendance at weekly, non-denominational devotional services during paid worktime? The undue hardship resulting from having to accommodate an employee's religious objection to religious expression in a Christian company is no less present in the instant case than is the undue hardship which would exist if an employee of a pornographic magazine demanded accommodation for the employee's religious objection to pornography.

The Court of Appeals makes a theological judgment that since Townley went for several years in its small Arizona plant without devotional services, there can be no adequate foundation for asserting that excusing Pelvas would have imposed undue spiritual hardship on the Townley's business. [Opinion of Ninth Circuit at A-12a]. The Court of Appeals apparently ignored, however, the fact Townley's devotional services policy had been in effect continuously and without interruption since the inception of the company at its main plant in Florida and various forms of religious expression were introduced at satellite plants at different stages during the growth of the Townley business. Nevertheless, the Court instructs the District Court to extend a refashioned devotional services injunction to all of Townley's plants [Opinion of Ninth Circuit at A-23a f.n. 18].

Clearly, if the ruling of the Ninth Circuit is not reversed by this Court, then Townley and the owners of other religious corporations similar to Townley would only be permitted to continue their religious expression in the workplace upon the condition that should there be a religiously based objection to such expression by an employee, then the employee must be accommodated by presumably isolating the employee from the religious

expression. Ultimately, the fear of Title VII religious discrimination actions will cause many such employers to discontinue their religious expressions in the workplace.

III. The Free Exercise Clause Gives Townley the Right to Carry Out Its Religious Mission by Conducting Devotional Services for All of Its Employees Where Attendance Is Required.

Townley's expression of religious belief in the form of mandatory devotional services and in the other forms of religious observance by Townley, are shielded by the Free Exercise Clause of the First Amendment. While the Court of Appeals recognized the right of Townley to assert the Free Exercise rights of Jake and Helen Townley in this action, Townley disagrees with the court's assessment that "it is unnecessary to address the abstract issue of whether a for-profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers". [Opinion of Ninth Circuit at A-19a]. As Judge Noonan correctly points out in his dissent, "the First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that Townley Manufacturing Company rightly invokes. Nothing in the broad sweep of the amendment puts corporations outside its scope." [Opinion of Ninth Circuit, dissenting opinion at A-26a].

Corporations have previously appealed to the protection of Religion Clauses with success. *See, Amos, supra*; *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).[3] As also pointed out by Judge Noonan, the First

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[3] Corporations have been extended constitutional protections as "persons" in a wide variety of areas. The corporate person is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment (*Minneapolis and St. L. Ry. v. Beckwith*, 129 U.S. 26 (1889) (Due Process); *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886) (Equal Protection Clause). A cor-

Amendment does not authorize Congress to pick and choose the persons or entities or the organizational forms which are free to exercise their religion. "All persons—and under our Constitution all corporations are persons —are free. A statute cannot subtract from their freedom." [Opinion of Ninth Circuit, dissenting opinion at A-26a].

Therefore, Townley itself has the right of Free Exercise of Religion under the First Amendment.

The first among the Amendments to the United States Constitution is the admonishment that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof". This Court has long held the Religion Clauses of the First Amendment must be regarded by the courts as protected liberties of the highest order.

The Ninth Circuit incorrectly held the Free Exercise Clause was not violated by the application of Title VII's requirement of religious accommodation to the instant case.[4] Townley submits under the established framework

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poration is secure from the risks of double jeopardy, *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

In regard to the free speech of banks and public utility companies, the political utterances of business corporations are protected whether or not they are engaged in the business of communication. *See, Pacific Gas & Electric Co. v. P.U.C. of California*, —— U.S. ——, 106 S.Ct. 903 (1986); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

In cases involving the Free Exercise Clause, this Court has recognized the right of a corporation to advance the rights of its members in *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) and *Bob Jones University v. United States*, 461 U.S. 574 (1983). Although *Alamo* and *Bob Jones* both involve non-profit corporations, Townley contends that its for-profit corporate status should not be solely determinative of whether it has recognized Free Exercise rights.

[4] The Court of Appeals did agree that the District Court's enjoining of "*all* mandatory services at Townley's Eloy plant . . .

for Free Exercise analysis enunciated by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the EEOC's attempt to interfere with the religious expressions of Townley must yield to the superior constitutional requirement that Free Exercise must be "zealously protected, sometimes even at the expense of other interests of an admittedly high social importance . . .". *Id.* at 215.

In determining whether Townley's rights have been violated under the Free Exercise Clause, an analysis of three factors must be made, including the magnitude of this statute's impact, the existence of a compelling state interest and the extent to which an exemption would impede the objectives of the statute. *Id.*, at 216.

The Court of Appeals applied the *Yoder* three-pronged test and concluded:

1). "[E]nding mandatory attendance at the devotional services would have an impact on the Townleys' religious practice"; [Opinion of Ninth Circuit at A-20a]

2). "Protecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination." [Opinion of Ninth Circuit at A-21a];

3). "[T]o force the employee Pelvas to attend Townley's devotional services would seriously impede Title VII's goal". [Opinion of Ninth Circuit at A-22a].

The Court of Appeals summarizes its Free Exercise analysis by concluding:

> Where the practices of employer and employee conflict, as in this case, it is not inappropriate to require the employer, who structured the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate

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was too broad" and thus unduly burdened Mr. and Mrs. Townley's Free Exercise Rights. [Opinion of Ninth Circuit at A-23a]. "The goal of Title VII is served by protecting only those who have religious objection to the services." *Id.*

> the employee's Title VII rights. [Opinion of Ninth Circuit at A-22a].

In his vigorous dissenting opinion, Judge Noonan meets the Panel's Free Exercise analysis head on by reminding the court the undisputed facts are that Jake and Helen Townley made an agreement with God that their company would be "a faith-operated business whose primary purpose would be to share the Gospel of the Lord Jesus Christ and to remain completely dedicated to God's Service. . . . The fundamental purpose of the company is to stand as a testimony to God's blessing to all persons who operate their business according to Christian principles. In furtherance of that purpose Townley conducts the devotional services of which Pelvas complains". [Opinion of Ninth Circuit, dissenting opinion at A-30a].

After making his comprehensive review of the many Free Exercise cases which have come before the federal courts, Judge Noonan concludes "the result has not been good for free exercise". [*Id.* at A-28a]. Judge Noonan states:

> Secular men and women take secular values seriously. Men and women of the world believe that the world's business is important. When Congress elevates this business to a national priority it has been all too easy for officers of the government and even judges to ignore the countervailing command of the Constitution. In the Supreme Court the Constitution has been no shield for the spirit when Congress has ordained the spirit must yield to secular needs. [Opinion of Ninth Circuit, dissenting opinion at A-28a-29a].

The essence of Judge Noonan's Free Exercise analysis is the enjoining of Townley's mandatory devotional services would have a substantial adverse impact on its fundamental religious purpose and tenets and upon the beliefs of its owners and founders. Accordingly, Townley's right to Free Exercise of religion is a fundamental right which must be zealously protected. The line of federal cases involving the Free Exercise Clause have, on the whole,

supported the proposition that a Congressional mandate is of such compelling importance, federal legislation justifies burdens imposed upon the exercise of religious beliefs of Americans. This is the exact result which the Framers of the Constitution sought to avoid.

Since Townley demonstrated its religious beliefs are those which are protected by the Free Exercise Clause and since Title VII's impact constitutes a burden on Townley's religious expression, the burden of proof shifts to the government to prove compelling governmental interest and to prove an exemption in the Townley case would "do substantial harm to that interest". *See, Hobbie v. Unemployment Appeals Comm'n of Fla.*, —— U.S. ——, 107 S.Ct. 1046, 1049 (1987). The magnitude of government's interest must be examined to override the First Amendment's interest claim to be protected. Not only must the government's interest be examined, it must be "searchingly examine[d]". *Yoder, supra* at 221. The EEOC has failed to meet its burden of proof below.

What is the government's compelling interest in this case? In this highly sensitive Constitutional area "[o]nly the apparent abuses, endangering paramount interests, give occasion for permissible limitations". *Sherbert, supra* at 406, *quoting, Thomas v. Collins*, 323 U.S. 516, 530 (1945). Restrictions of the Free Exercise of religion are allowed only when it is necessary to prevent grave and immediate danger to interests which the state may lawfully protect. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Furthermore, speech is not any less protected because it is religious in nature. *See, Heffron v. International Society for Krishna Conscience*, 452 U.S. 640 (1981).

The evidence below is uncontroverted that Townley does not hire on the basis of an employee's religious persuasion. Townley has never fired or failed to promote any employee because of the employee's religious beliefs. No employee has ever been disciplined or discharged for failing to attend company sponsored devotional services.

The District Court found Louis Pelvas was not disciplined or otherwise prejudiced in his employment with Townley because of his atheistic beliefs. [District Court opinion at A-57a]. Townley's devotional services' policy is "rooted in religious belief" and Townley's right of Free Exercise of religion must be protected "even at the expense of other interests of admittedly high social importance . . ." *Wisconsin v. Yoder, supra* at 215.

In *Callahan v. Woods*, 736 F.2d 1269 (9th Cir. 1984), the Ninth Circuit acknowledged the Free Exercise analysis usually stops after the discovery of a compelling state interest. "The purpose of almost any law, however, can be traced to a fundamental concern of government. Balancing an individual's religious interest against such concern will inevitably make the former look unimportant." *Id.* at 1272. However, the most critical aspect of the Free Exercise analysis, according to the Court of Appeals, is whether the elimination of mandatory attendance at the devotional services constitutes an application of Title VII that is the "least restrictive means" of furthering the government's goal, [Opinion of Ninth Circuit A-21a, *citing, Callahan v. Woods, supra*, at 1272]. Here, the Ninth Circuit did not actually make a least restrictive means analysis, but only concluded that forcing Louis Pelvas to attend devotional services would seriously impede Title VII's goal.

To what extent, then, would allowing Townley to require attendance at devotional services for its employees impede the objectives sought to be advanced by the EEOC? Obviously, there will be no impedance to the objective of prohibiting discrimination in the hiring, promotion or discharge of Townley's employees. The goals and objectives of Title VII would still be accomplished at Townley despite Townley's requiring attendance at devotional services. Should a question arise in the future as to whether a Townley employee has been discriminated against in his or her hiring, promotion or discharge on the basis of the employee's sex, race or na-

tional origin, the EEOC is still free to bring charges of such discrimination against Townley and a Court could separately resolve those issues. A charge of religious discrimination which is not based upon Townley's religious expression in the workplace, would also be actionable against Townley.

The problem in this type of Free Exercise case is the absence of a framework for analyzing whether the application of Title VII to an employer's religious expression is the "least restrictive means" of furthering the government's goal where competing religious claims arise in the workplace. The "grave" and "novel" constitutional issues presented here necessitate recognition and deference to Townley's Free Exercise rights and to Townley's claim that no impedence to the objectives of Title VII will occur by exempting Townley's devotional services policy from Title VII. To facilitate such a Free Exercise analysis, Townley suggests a three part test be utilized by the Court to distinguish the Free Exercise claim here from the facts in cases such as *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975).

In *Young*, a bank held monthly staff meetings at the beginning of which a Baptist minister gave a short religious talk and prayer. The Plaintiff, Mrs. Young, was hired by the bank and told of the monthly staff meetings. But, Mrs. Young was not informed at the time of her employment that the staff meetings included a short religious talk and prayer. After attending a few such staff meetings, Mrs. Young then ceased her attendance for a period of six months. Mrs. Young was an atheist who objected to attending the monthly staff meetings. However, Mrs. Young did not voice her objection until she was told her attendance at the staff meetings was mandatory. As a result of the religious aspects of the monthly staff meetings, their mandatory character and her professed atheistic beliefs, Mrs. Young left her employment. Thereafter, Mrs. Young filed an action for constructive discharge.

The Fifth Circuit Court of Appeals held the bank had constructively discharged Mrs. Young. The bank in *Young* did not raise any religious belief defenses to the accommodation requirement.

The Free Exercise Clause—Title VII conflict arises when an employer exercises its religious beliefs in the form of a religious expression which is then objected to by an employee on religious grounds. The suggested three part test for distinguishing valid Free Exercise claims from cases which fall within the rule enunciated in *Young*, consists of a determination by the Court; (1) whether the religious beliefs of the employer are sincerely held and have been actively and consistently expressed both within and without the business environment; (2) whether the religious activity in question bears a close relationship to the religious beliefs and tenets of the employer; (3) whether the employee was advised of the religious expression at the employer's workplace at the time of employment or otherwise waived his or her right to object.

If, after completing this analysis, the court finds each test has been satisfactorily met, the employer's right to exercise its religious beliefs should be upheld under the Free Exercise Clause even though an employee subsequently demands accommodation of his or her religious objection to the employer's expression of religious beliefs in the workplace.

In the instant case, the application of the suggested analytical framework clearly results in a finding that the abridgement of Townley's Free Exercise rights by the application of Title VII is not warranted. First, the religious beliefs and tenets of both the Townleys and the company are sincerely held and their beliefs and tenets have been actively expressed within and without the Townley business, including the expression of devotional services for employees where attendance is required and other forms of Christian witness. Second, the devotional services are inseparably related to the religious beliefs

and tenets of Mr. and Mrs. Townley and the Townley Company. The devotional services at issue are conducted once per week during the employees' paid worktime and do not require active participation by the employees. Third, it is clear that Townley employees have consented to attending devotional services conducted by Townley as a part of their written employment contract.

The facts in *Young, supra,* are clearly distinguishable from the facts in the instant case when the three part test is used in the analysis. Firstly, the bank in *Young* was not founded for a religious purpose as was the Townley company. There was no evidence in *Young* that the owners and managers of the bank had sincerely held religious beliefs. Moreover, there was no evidence the bank conducted other ministries as a part of any overall religious mission. Accordingly, on the first test of the suggested three part analysis, the bank in *Young* should not be construed to be a religious employer.

Secondly, in the second part of the proposed test to be used by the Court in balancing the religious liberties of the employee and the employer, there is not any evidence in *Young* the religious talk and prayer given at the beginning of the staff meetings were closely tied to the religious tenets of the bank. Unlike *Young*, the nexus between the devotional services and the religious purpose of the Townley Company, is very close.

Thirdly, in *Young* Mrs. Young was caught by surprise when she attended her first bank staff meeting when a Baptist minister came in the room and gave a talk and offered a prayer. Mrs. Young was not informed of the bank's policy of staff prayer at the time of employment, nor did Mrs. Young subsequently waive her right to object. Accordingly, a claim that the bank in *Young* was entitled to maintain a prayer service, would have also failed on the third test of the proposed analytical framework for balancing religious freedoms. Conversely, in the Townley case, Louis Pelvas gave his written consent to attending devotional services two years prior to the actual

implementation of the devotional services policy in Eloy, Arizona.

The Court of Appeals below asserted that the "transcendent principle in cases of this sort is accommodation". [Opinion of the Ninth Circuit at A-23a]. However, Judge Noonan suggests the only transcendent principle in this case is contained in the First Amendment guarantee of each person's right to worship God as his or her conscience determines. [Opinion of Ninth Circuit, dissenting opinion at A-26a]. The Court of Appeals, in adopting the EEOC's position in the case, has agreed with the EEOC's theological interpretation of Townley's religious mission by concluding the Townleys would still be able to "share" the Gospel with their employees if the devotional services were not mandatory. [Opinion of Ninth Circuit at A-21a]. The entanglement of the EEOC in the religious affairs of Townley is clearly present because the EEOC's interpretation of what "sharing" the Gospel means will be the interpretation Townley and its owners will be required to adopt regardless of the covenant Mr. and Mrs. Townley made with God when the Townley business was formed.

Townley submits the right of an employer to express religious belief within the workplace must be clearly established and not be conditioned upon the lack of employee objection. Otherwise, there will be a definite "chilling effect" upon Townley's religious expression and religious mission because the fear reasonably exists that should Townley ever be forced to lay off or fire an objecting employee for reasons unrelated to that employee's religious objection, a charge of retaliation would likely be filed with the EEOC and an investigation and litigation would no doubt ensue.

This Court has held "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of success or failure", *Dombroski v. Pfister*, 380 U.S. 479 (1965) and "[t]he threat of sanctions may deter their

exercise almost as potently as the actual application of sanctions". *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Townley's fears of future prosecution by the EEOC on claims of retaliatory discharge are well-founded. In 1972 the EEOC took coercive action against a company which conducted voluntary weekly "religious meetings" for its employees. Although the company officials and the company's personnel handbook stated that attendance was voluntary, the EEOC determined the "great emphasis placed on the weekly devotional service has the effect of making it mandatory to attend". CCH, Employment Practices Decisions, case No. 72-0528 ¶ 6316.

In summary, Townley urges the Court to grant its Petition because the issues contained in this case are of such great importance the United States Supreme Court should establish the respective rights of employers and employees when competing religious beliefs exist in the private workplace. Without this Court's intervention, the Free Exercise rights of employers will cease to be treated as "rights" and will become mere privileges which must give way to the statutory right of employee accommodation under Title VII. Judge Noonan eloquently summarizes the entire case in his concluding paragraph of his dissent when he said:

> For an agency of the government, or Congress, or a court to say that the Townleys are mistaken in their beliefs or that the Townley Manufacturing Company cannot have the purpose ascribed to it and shall not carry out the program of devotion it has set up is to make a theological judgment—a theological judgment fairly characterized as reflecting either a secularism skeptical of God's existence and power or a species of deism that radically isolates God from the world that believers believe God created and animates and directs. The First Amendment prohibits an agency of government, or Congress, or even a court, from imposing such a theological judgment to curb the free exercise of religion.

Jake and Helen Townley and the Townley Company respectfully request the granting of the Townley Petition in order to obviate the theological judgment made by the courts below and to resolve the Free Exercise Clause—Title VII conflict which exists when an employer's expression of religious belief in the workplace is objected to by an employee.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2272

D.C. No. CV-86-1156-EHC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

TOWNLEY ENGINEERING & MANUFACTURING COMPANY,
Defendant-Appellant.

Appeal from the United States Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted
March 18, 1988—San Francisco, California

Filed September 19, 1988

Before: Joseph T. Sneed, Cynthia Holcomb Hall and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Sneed; Dissent by Judge Noonan

H. Edward Dean, Ocala, Florida, for the defendant-appellant.

Lorraine C. Davis, Assistant General Counsel, Equal Employment Opportunity Commission, Washington, D.C., for the plaintiff-appellee.

OPINION

SNEED, Circuit Judge:

Townley Manufacturing Company appeals the district court's injunction halting its mandatory devotional services at its Eloy, Arizona plant. We substantially affirm the district court, but remand to permit the framing of its injunction more narrowly.

I.

FACTS AND PROCEEDINGS BELOW

Townley Manufacturing Company (Townley) is a closely held corporation organized under the laws of Florida. It manufactures mining equipment. It was founded in 1963 by J.O. (Jake) and Helen Townley, who still own about 94% of the stock. When they founded the company, Jake and Helen Townley made a covenant with God that their business "would be a Christian, faith-operated business." The Townleys were and are "born again believers in the Lord Jesus Christ" who "are unable to separate God from any portion of their daily lives, including their activities at the Townley company." Appellant's Brief at 6. Townley opened its first plant in Florida; it has since opened other plants, including one in Eloy, Arizona in 1973.

Townley reflects its founders' covenant with God in several ways. For example, the company encloses a Gospel tract in every piece of outgoing mail; it prints Biblical verses on all company invoices, purchase orders, and other commercial documents; it gives financial support

to various churches and missionaries; and, of particular importance to this case, it holds a devotional service once a week during work hours.

Townley's Florida plant has had weekly devotional services since its inception. They typically last from thirty to forty-five minutes, and may include prayer, thanksgiving to God, singing, testimony, and scripture reading, as well as discussion of business related matters. Townley required all employees to attend the weekly services; failure to attend was regarded as equivalent to not attending work.

In November 1979, Townley hired Louis Pelvas as a machinist in its Eloy plant. At that time there were no devotional services conducted at the Eloy plant. In December 1982, Townley gave its employees an employee handbook, which stated the company's policies and rules. Under the heading of company rules, the handbook stated: "All employees are required to attend the non-denominational devotional services each Tuesday. Employees are paid for their time while attending these services." Pelvas read the handbook and signed a statement agreeing, *inter alia*, "to abide by all the requirements and policies stated within that handbook, as a condition of my continued employment with Townley . . . . I recognize that failure on my part to keep this agreement may result in my dismissal from the company." Excerpt of Record, tab 49.

Townley did not institute devotional services at its Eloy plant until April 1984. Pelvas attended the services without complaint only until June 1984, when he asked to be excused from the services because he was an atheist. His supervisor told him that attendance was mandatory. The supervisor also stated that Pelvas could sleep or read the newspaper during the services. Pelvas continued to attend the services, but in October 1984 he filed a religious discrimination charge with the Equal Employment

Opportunity Commission. In December 1984, Pelvas left the company. Pelvas states that he was constructively discharged; Townley says that Pelvas refused to accept an offer of transfer to another plant.

In July 1986, the EEOC filed this action against Townley. The EEOC charged that Townley violated section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), (1) by requiring its employees to attend devotional services, (2) by failing to accommodate Pelvas' objection to attending the services, and (3) by constructively discharging Pelvas. In May 1987, the district court granted the EEOC's motion for summary judgment on the first two issues, and issued a permanent injunction prohibiting Townley from continuing the mandatory devotional services at its Eloy plant. The court denied summary judgment on the constructive discharge issue. *EEOC v. Townley Eng'g & Mfg. Co.*, 675 F. Supp. 566 (D. Ariz. 1987). Townley appealed the grant of summary judgment to this court.[1]

II.

JURISDICTION

The district court had jurisdiction under 42 U.S.C. § 2000e-5(f)(1) and 28 U.S.C. §§ 1331 and 1343. Since the order appealed is an interlocutory order granting an injunction, our jurisdiction rests upon 28 U.S.C. § 1292(a)(1).

III.

STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*. We affirm if the record, read in the light most favorable to the nonmoving party, reveals no gen-

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[1] The parties went to trial on the constructive discharge issue, and in April 1988 the court found for Townley. That issue is not before us.

uine issue of material fact and the moving party is entitled to judgment as a matter of law. *International Ass'n of Machinists v. Aloha Airlines, Inc.*, 790 F.2d 727, 730 (9th Cir.), *cert. denied*, 107 S. Ct. 400 (1986).

IV.

THE REACH OF TITLE VII

Townley argues both that Title VII was not intended to apply to this employment policy, and that the proposed application of Title VII would violate the Free Exercise Clause of the First Amendment. It is clear that applying Title VII to the devotional services "would give rise to serious constitutional questions." *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979). Therefore, we may not find it applicable unless there is an "affirmative intention of Congress clearly expressed" that it should be so applied. *Id.*; *see EEOC v. Fremont Christian School*, 781 F.2d 1362, 1365 (9th Cir. 1986); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982).

We hold that Congress did clearly intend for Title VII to cover Townley's mandatory devotional services. Sections 701(j) and 703(a) of Title VII make clear that requiring employees over their objections to attend devotional services cannot be reconciled with Title VII's prohibition against religious discrimination. Furthermore, we hold that Congress did not intend section 702's exemption for religious corporations to shield corporations such as Townley.[2] We do hold, however, that Jake and

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[2] We note that under the facts of this case, no construction of section 702 would avoid significant First Amendment questions. If we held that Townley was a "religious corporation" under the meaning of section 702, and therefore exempt from Title VII's prohibition against religious discrimination, then we might be faced with a question the Supreme Court left open in *Corporation of the Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987): whether exemption of a religious corporation's for-profit activities violates

Helen Townley have certain rights under the Free Exercise Clause that Title VII cannot infringe.

A. *Section 701(j) and 703 of Title VII*

1. *Discrimination on the Basis of Religion in General*

As originally enacted, Title VII of the Civil Rights Act of 1964 simply prohibited employment discrimination on the basis of religion.[3] This prohibition clearly covered discrimination on the basis of religious *belief*; whether it protected employees' religious *practices* was less clear. To clarify the point, Congress amended Title VII in 1972 by adding a definition of religion.[4] The definition, contained in section 701(j), states:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice

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the Establishment Clause. *See id.* at 2875 (O'Connor, J., concurring in the judgment).

[3] Section 703(a) of Title VII states in part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a).

[4] The amendment was in direct response to the decision in *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). The plaintiff in *Dewey* argued that his employer had a duty under Title VII to accommodate his religious practice of not working on Sundays. The Sixth Circuit rejected this argument. It noted that Title VII's language prohibits discrimination, and said that the employee was not treated differently because of his religion. This holding had the potential to exclude all religious practices from coverage by Title VII, since "[t]he accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j). "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). Accommodation by the employer to the employee's religious practices was made a statutory obligation.

2. *Order of Proof*

We have read sections 703(a) and 701(j) as creating a two-part framework in religious practice cases. First, the plaintiff must establish a prima facie case of religious discrimination. We have elaborated on the requirements of the plaintiff's burden in other opinions. We need not review the requirements in detail here, because Townley does not contest that the EEOC has met them.[5]

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[5] We have stated that plaintiffs must meet a three-part test to establish a prima facie case of religious discrimination under sections 703(a) and 701(j). *See Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). The employee must show that (1) a bona fide religious belief of the employee conflicted with an employment policy; (2) the employee informed the employer of the conflict; and (3) the employee was penalized in some way because of the conflict. We note that although we have occasionally used language implying that the employer must *discharge* the employee because of the conflict, *see Anderson*, 589 F.2d at 401, we have never in fact required that the employee's penalty for observing his or her faith be so drastic. The *threat* of discharge (or of other adverse employment practices) is a sufficient penalty. *See Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). An employee does not cease to be discriminated against because he temporarily gives up his religious practice and submits to the employment policy. *See American*

Suffice it to say that after the plaintiff has made out a prima facie case, the burden shifts to the employer "to prove that [it] made good faith efforts to accommodate [the employee's] religious beliefs and, if those efforts were unsuccessful, to demonstrate that [it was] unable reasonably to accommodate his beliefs without undue hardship." *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978).

3. *Accommodation*

Townley admits that it has made no effort to accommodate Pelvas' objections to the services. It argues that Title VII does not require accommodation because (1) any attempt at accommodation would have caused it "undue hardship," and (2) Pelvas "waived the accommodation requirement when he voluntarily consented to attending the devotional services at the time he executed the signature page of the Employee Handbook agreeing to comply with all the policies of Townley," Appellant's Reply Brief at 8-9.[6]

The language from *Anderson* quoted above might be read to imply that an employer cannot bring up "undue hardship" unless it first proves that it made good faith efforts to accommodate the employee's practice. *See also American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 776 (9th Cir. 1986) ("it is incumbent upon the employer to undertake some initial steps to reach a reasonable accommodation of the particular religious belief at issue"); *Burns v. Southern Pac. Transp.*

Postal Workers Union v. Postmaster General, 781 F.2d 772, 774-75 (9th Cir. 1986).

On appeal, Townley does not argue that atheistic beliefs are not protected against religious discrimination. *See Young v. Southwestern Sav. and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975).

[6] Townley also argues that section 702 of Title VII exempts it completely from Title VII's religious accommodation requirement. *See* Part IV.B., *infra*.

Co., 589 F.2d 403, 405-06 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). However, it is doubtful that this language should be read so broadly. If an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that he engage in a futile act. *See Ansonia Bd. of Educ. v. Philbrook*, 107 S. Ct. 367, 372 (1986) ("the extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship").[7] The language in our cases merely emphasizes that the burden of attempting an accommodation rests with the employer rather than the employee. When an employer does not propose an accommodation, or when its proposed accommodation does not eliminate the employee's religious conflict, the employer must accept the employee's proposal or demonstrate that the proposal would cause the employer undue hardship. *See American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 776 (9th Cir. 1986); *Burns*, 589 F.2d at 406.

Pelvas proposed that Townley accommodate his religious objections to the devotional services by excusing

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[7] We have often allowed an employer who has made no attempt at accommodation to argue as justification "undue hardship." *See, e.g., Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981); *Burns v. Southern Pacific Transp. Co.*, 589 F.2d 403 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Anderson v. General Dynamics Convair Div.*, 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). *Proctor v. Consolidated Freightways Corp.*, 795 F.2d 1472 (9th Cir. 1986), is not to the contrary. In that case, the employer had made efforts to accommodate and the issue was whether the efforts were made in good faith. *Id.* at 1477. We remanded to the district court for further findings on that issue, and therefore did not reach the employer's "undue hardship" argument. *See id.* at 1475 n.1. In this case, Townley's good faith is not in question. Townley sincerely believes no accommodation is possible without undue hardship. Obviously, an employer does not act in bad faith when it does not attempt an accommodation it sincerely believes would cause it undue hardship.

him from attendance. The district court found that this accommodation would have caused Townley no undue hardship. It stated, "Excusing Pelvas from the mandatory devotional services would have cost Townley nothing in the operation of its business activities, and would not have disrupted other workers." 675 F. Supp. at 568. We agree.

Townley argues that the district court should have considered the spiritual hardship the accommodation would have caused. We acknowledge that spiritual costs can exist. Congress has so recognized by its enactment of sections 702 and 701(e).[8] Townley is, of course, right when it says, "Cost cannot always be measured in terms of dollars. Spiritual 'costs' must also be given consideration . . . ." Appellant's Brief at 27. It is very doubtful, however, that such "costs" can impose on a corporate employer the required level of hardship.

The difficulty is that under the statute the employer must show that the accommodation of a religious practice would cause "undue hardship *on the conduct of the employer's business.*" 42 U.S.C. § 2000e(1) (emphasis added). To assert that excusing Pelvas from the services would have inflicted spiritual costs on the company, or on Jake and Helen Townley is not enough. *Cf. Burns*, 589 F.2d at 407 (proof of coworkers' "unhappiness with a particular accommodation" is not enough to show undue hardship). Townley, the corporate entity, must connect the asserted spiritual hardship to an adverse impact on the conduct of the business. "A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on coworkers or disruption of the work routine.'" *Tooley v. Martin-Marietta Corp.*, 648

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[8] In addition, section 703(e)(1) allows employers to hire employees on the basis of their religion if it is a "bona fide occupational qualification"; section 703(e)(2) allows religious educational institutions to discriminate on the basis of religion.

F.2d 1239, 1243 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981) (quoting *Burns*, 589 F.2d at 406-07); *see also Hardison*, 432 U.S. at 81 (Title VII does not require rights of coworkers to be infringed in order to accommodate employee's religious practice); 3 Larson, *Employment Discrimination* § 92.12, at 19-35 to -47 (1987) (arguing that the most important factor in *Hardison* was impact on coworkers, not impact on employer). The statute, in brief, posits a gain-seeking employer exclusively concerned with preserving and promoting its economic efficiency. This is a legitimate supposition with respect to corporate employers.

It follows that Townley's attempts to link the alleged spiritual hardship to the conduct of the business must fail. It is not enough to argue that Townley was founded to "share with all of its employees the spiritual aspects of the company," Appellant's Brief at 27, and that the proposed accommodation would have a "chilling effect" on that purpose. To "chill" its purpose is irrelevant if it has no effect on its economic wellbeing.

It is true, of course, that Title VII does not ignore entirely the spiritual objectives of employers. Section 702 of Title VII expresly excludes religious corporations, associations, educational institutions, and societies from Title VII's prohibition against religious discrimination. 42 U.S.C. § 2000e-1. It is likely that Congress intended section 702 to be the sole resource of corporations professing to be religious.[9]

However, even if this is not so, any effort in this case by Townley to show that its religious nature makes any accommodation of the religious belief of Pelvas an "undue hardship" under section 701(j) must fail. At most, Townley has stated that the ease with which it spreads its word to its employees would be slightly reduced were

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[9] Unless, of course, the corporations are able to invoke successfully section 703(e)(1) or (2). *See* note 8, *supra*.

it to accommodate Pelvas. But "[u]ndue hardship means something greater than hardship." *Anderson*, 589 F.2d at 402. Pelvas was allowed to listen to the radio and read at the services, and the Eloy plant operated for eleven years without requiring its employees to attend services. This hardly provides an adequate foundation for asserting that excusing Pelvas would have imposed undue spiritual hardship on Townley's business.

Nor does the fact that the services also contain "business discussions" alter this conclusion. Townley argues that these business discussions cannot be separated from the rest of the service. Its only support for this assertion is Jake and Helen Townley's statement that they cannot separate God from their business. It does not argue that the attempt to separate the secular aspects of the service from the religious would cause hardship to coworkers or disrupt the work routine. Stripped to its core, then, this argument is the one considered and rejected above—that the accommodation would cause spiritual hardship to Townley. Even if undue hardship to Townley's business could be supplied by establishing a high degree of "spiritual hardship," a rather doubtful proposition, Townley has failed to establish that level of hardship.

Townley also argues that it did not have to accommodate Pelvas' objections to the services because Pelvas waived his rights to accommodation by signing a page of the Employee Handbook which committed him to complying with Townley's policies. The Supreme Court has stated that "there can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974); *see also Spirides v. Reinhardt*, 613 F.2d 826, 832 (D.C. Cir. 1979); *McClure v. Salvation Army*, 460 F.2d 553, 557 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *cf. J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944). There are exceptions to this general rule, *see, e.g., Alexander*, 415 U.S. at 52

(voluntary settlements); *Bauman v. United States District Court*, 557 F.2d 650, 658 n.9 (9th Cir. 1977) (plaintiff ineligible for class action), but we decline to add another. Allowing the waiver of Title VII rights through convenants in employment contracts would undermine Title VII's policy of eradicating discrimination in employment.

B. *The "Religious Corporation" Exemption of Section 702*

Townley next argues that it is a "religious corporation" exempt from Title VII by the terms of section 702, which states in part:

> This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1. The district court rejected this argument, as do we.

A brief review of the relevant legislative history is necessary. In 1963, the House Judiciary Committee drafted H.R. 7152, the bill which was the basis of much of the Civil Rights Act of 1964. Title VII of the bill included a section that stated the title would not apply to a "religious corporation, association, or society." The committee report accompanying the bill did not elaborate on the section. However, the section was the subject of some debate in the House after Representative Purcell proposed amending H.R. 7152 to allow an educational institution to discriminate on the basis of religion if the institution was wholly or partly supported or managed "by a particular religion or by a particular religious corporation, association, or society," or if the institution's cur-

riculum was "directed toward the propagation of a particular religion." *EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3197 (1968).

The debate on this proposal is relevant because an issue in the debate was whether such institutions were already protected by the "religious corporation" exemption. The consensus was that they were not protected if they were merely "affiliated" with a religious organization. For example, Representative Celler, the chairman of the Judiciary Committee and one of the drafters of the bill, was asked whether a church-supported orphanage would already be covered by the bill. He said, "If it is a *wholly church supported organization*, that is, a religious corporation that comes under [then] section 703." *Id.* at 3204 (emphasis added).[10] This coverage was considered too narrow, and the House passed the proposed amendment.[11]

Although this debate is far from comprehensive, it is the only useful legislative history we have on this section. Section 702 was amended by the Senate in 1964, and amended again by Congress in 1972, but the debate on the amendments sheds no more light on the definition of religious corporations.[12] The debate over Representative

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[10] *See also id.* at 3201 (remarks of Rep. Roosevelt, stating that a church-supported orphanage would "unquestionably" be exempt under section 702 if it were "wholly owned" by the religious order).

[11] The amendment was eventually passed as section 703(e)(2) of the Civil Rights Act, and codified at 42 U.S.C. § 2000e-2(e)(2), where it remains.

[12] In the Senate, Senators Dirksen, Mansfield, Humphrey, and Kuchel drafted a substitute bill for the House bill. The substitute bill changed section 702 in two ways, both of which were adopted in the final draft of the Civil Rights Act. In the words of Senator Humphrey, who presented the bill to the Senate, the section

> was amended to limit the general exemption of religious groups to those practices relating to the employment of individuals of

Purcell's amendment does indicate, however, that Congress's conception of the scope of section 702 was not a broad one. All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm.

As the district court noted, the case law on this question is not very helpful. In most cases, the defendant is clearly a "religious corporation, association, educational institution, or society" within the meaning of section 702 of the statute. *See, e.g., EEOC v. Fremont Christian School*, 781 F.2d 1362, 1364 (9th Cir. 1986) (defendant was "private educational institution . . . wholly owned and operated by the Assembly of God church"); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1274 (9th Cir. 1982) (defendant was "nonprofit corporation . . . affiliated with the Seventh-Day Adventist Church" engaged in publishing "religiously oriented material"); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1164-65 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986) (defendant was church); *EEOC v. Mississippi College*, 626 F.2d 477, 478 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (defendant was college owned and operated by convention of Southern Baptist churches). These cases, like the legislative

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a particular religion to perform work connected with the employer's religious activities, and to extend the exemption to private educational institutions with respect to the employment of individuals to perform work connected with the educational activities of such institutions.

Legislative History, supra, at 3004.

The Equal Opportunity Act of 1972 changed section 702 to its present form. First, it deleted the clause exempting all educational institutions, and included educational institutions among the religious organizations listed in the section. Second, it amended the section to allow the organizations to discriminate on the basis of religion with respect to all their activities, not just their religious ones.

history, demonstrate that the central function of section 702 has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities.[13]

At least one case has tested the limits of this exemption. In *Fike v. United Methodist Children's Home*, 547 F. Supp. 286 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983), the plaintiff alleged that the Children's Home dismissed him from his position as director because it wanted a Methodist minister in the position. The court found that the Children's Home "was founded by and over the years has had close ties with the Methodist Church." *Id.* at 288. The Methodist Church became worried that the Home was becoming too secular, and as a result recommended that the Home hire a Methodist minister as director "in order to bring the Home back to the Church structure." *Id.* at 289. Despite these facts, the court refused to find that the Home was a "religious corporation" within the meaning of section 702. After examining the purported religious and secular characteristics of the Home at length, *id.* at 289-90, the court stated:

> While the original mission of the United Methodist Children's Home may have been to provide a Christian home for orphans and other children, that mission has not remained unchanged. The facts show that as far as the direction given the day-to-day life for the children is concerned, it is practically devoid of religious content or training, as such. While the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and charitable one, it is not necessarily a religious one. For

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[13] Of course, even without section 702, the First Amendment would limit Title VII's ability to regulate the employment relationships within churches and similar organizations. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952); *McClure v. Salvation Army*, 460 F.2d 553, 558-61 (5th Cir. 1972).

> an organization to be considered "religious" requires something more than a board of trustees who are members of a church. The Court, therefore, holds that for the purposes of the exemption in § 2000e-1 the United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular organization.

Id. at 290.

Like the *Fike* court, we shall not attempt to outline section 702's precise scope. The effort to do so would fail. Rather, each case must turn on its own facts. All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious. Only when that is the case will the corporation be able to avail itself of the exemption.[14]

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[14] We have previously taken a somewhat similar approach in an area of the law that raises similar issues. In *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436 (9th Cir. 1983), the NLRB sought to require the Hospital to enter into collective bargaining with a union representing its service and maintenance employees. The Hospital challenged the NLRB's jurisdiction over it, arguing that "since it is owned and operated by a religious order of the Catholic Church, Board jurisdiction would produce excessive entanglement between government and religion in violation of the First Amendment's free exercise and establishment clauses." *Id.* at 1438. To determine whether NLRB jurisdiction over the Hospital would violate the Establishment Clause, we applied the three-part analysis set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Most of our discussion was devoted to the third element of the test: whether the statute fosters excessive government entanglement with religion. Relying on *Lemon*, we said that examination of this element requires consideration of "the character and purpose of the institution affected, the nature of the activity the government mandates, and the resulting relationship between government and the religious organization." 708 F.2d at 1441 (citing *Lemon*, 403 U.S. at 615). In examining "the character and purpose of the institution affected," we looked closely at the Hospital's "institutional characteristics," and determined that its "primary purpose" and

Townley and the EEOC do not dispute the "primarily religious standard. They differ over whether Townley is primarily religious or secular. On the secular side, the company is for profit. It produces mining equipment, an admittedly secular product. It is not affiliated with or supported by a church. Its articles of incorporation do not mention any religious purpose. Against these elements are the facts that Townley encloses Gospel tracts in its outgoing mail, prints Bible verses on its commercial documents (such as invoices and purchase orders), financially supports churches, missionaries, a prison ministry, and Christian radio broadcasts, and, of course, conducts a weekly devotional service. Underlying these facts, of course, is "the discipleship Jake and Helen Townley have for the Lord Jesus Christ."

When viewed together, we have no difficulty in holding that these characteristics indicate that Townley is primarily secular. We do not question the sincerity of the

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"principal function," *id.*, were not religious, and that its character was "pervasively secular." *Id.* at 1442. We went on to hold that the NLRB's jurisdiction would not violate the Establishment Clause.

Although we adopt a similar approach in this case, we do not mean to imply that the analysis in a section 702 case is the same as in an Establishment Clause case. Our inquiry here is to determine whether the "general picture" of the institution is primarily religious or secular. *Cf. Roemer v. Board of Public Works*, 426 U.S. 736, 758 (1976). In Establishment Clause cases, the "general picture" is only one element for the court to consider in determining whether the government activity in question "fosters excessive government entanglement with religion." *St. Elizabeth*, 708 F.2d at 1436. In making that determination, a court may have to conduct more particular inquiries into the institution's character than simply deciding whether it is primarily religious or secular. For example, an institution with a substantially, or even primarily, religious character may nevertheless have activities which can be regulated by the government without fear of excessive entanglement. *See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1282 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 286 (5th Cir. 1981).

religious beliefs of the owners of Townley. Nor do we question that they regard the conduct of their company as subject to a compact with God. We merely hold that the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation "religious" within the meaning of section 702. We therefore agree with the district court that Townley is not exempt under section 702 from Title VII's prohibition against religious discrimination.

V.

FREE EXERCISE CLAUSE

We now address Townley's contention that this application of Title VII violates its rights under the Free Exercise Clause of the First Amendment.

Townley urges this court to hold that it is entitled to invoke the Free Exercise Clause on its own behalf. Because Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers. Townley presents no rights of its own different from or greater than its owners' rights. *See* Appellant's Brief at 35 ("Townley Company is an extension of the beliefs of Mr. and Mrs. Townley, and for all purposes, the beliefs of Mr. and Mrs. Townley are the beliefs and tenets of the Townley Company."). Thus, the rights at issue are those of Jake and Helen Townley.[15]

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[15] Townley has standing to assert Jake and Helen Townley's Free Exercise rights. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985).

It is clear, of course, that the Free Exercise Clause protects "religious organizations" as well as individuals. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial*

To determine whether the application of Title VII to this employment policy violates Mr. and Mrs. Townley's Free Exercise rights, we must weigh three factors: "(1) the magnitude of the statute's impact on the exercise of a religious belief; (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief; and (3) the extent to which recognition of an exemption from the statute would impede objectives sought to be advanced by the statute." *EEOC v. Fremont Christian School*, 781 F.2d 1362, 1367 (9th Cir. 1986); *see United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.").

The Townleys state that the Bible and their covenant with God require them to share the Gospel with all of their employees. The EEOC does not dispute the sincerity of this belief, and in any event "[c]ourts are not arbiters of scriptural interpretation." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). We therefore accept that ending mandatory attendance at the devotional services

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Presbyterian Church, 393 U.S. 440, 445-49 (1969); Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981) ("Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] clause."). The Supreme Court has not discussed the scope of the term "religious organization," but it clearly includes organizations less pervasively religious than churches. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983). We have often assumed without discussion that organizations with religious elements have Free Exercise rights. *See EEOC v. Fremont Christian School*, 781 F.2d 1362, 1367-69 (9th Cir. 1986); *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1442-43 (9th Cir. 1983); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1279-81 (9th Cir. 1982). Again, we need not decide whether these cases support Townley's contention that it has Free Exercise rights.

would have an impact on the Townley's religious practice. But we do not believe that the impact would be unreasonable and extreme. The EEOC does not seek to enjoin the services altogether; rather, it only objects to their mandatory nature. As the EEOC points out, the Townleys would still be able to share the Gospel with their employees.[16] Nevertheless, viewing the evidence in the light most favorable to the Townleys, it is clear that enjoining the services would make it more difficult for them to impart their religious message to their employees, and therefore to some extent would adversely affect their religious practices.

The strength of the government's interest in eradicating discrimination through Title VII is also clear. We have stated that "Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *Pacific Press*, 676 F.2d at 1280. Protecting an employee's right to be free from forced observance of the religion of his employer is at the heart of Title VII's prohibition against religious discrimination.

Finally, we must consider whether the elimination of mandatory attendance at the devotional services constitutes an application of Title VII that is the "least restrictive means" of furthering the state's goal. We have said that this is "the critical aspect of the free exercise analysis." *Callahan v. Woods*, 736 F.2d 1269, 1272 (9th Cir. 1984). *Callahan* teaches that we measure the importance of a

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[16] We again note that (1) the mandatory services were not instituted at the Eloy plant for the first eleven years of its existence, and (2) Pelvas was allowed to read and listen to the radio at the services. We do not think these facts contradict the Townleys' assertion that excusing employees from the services would affect their religious practice, but they are evidence that the impact would not be great.

> regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction. If the compelling state goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest.

Id. at 1272-73 (citation omitted). Here, there is no doubt that to force the employee Pelvas to attend Townley's devotional services would seriously impede Title VII's goal.

The rights of the Townleys under the Free Exercise Clause do not alter this conclusion. We recognize that allowing a statute to limit a constitutional right alters the normal relationship between a statutory right and a constitutional one. Nevertheless, it is settled that the right to religious practice (unlike the right to religious belief) may be limited by a statute if "it is essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 255 (1982); *see Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961); *Callahan v. Woods*, 736 F.2d 1269, 1272-73 (9th Cir. 1984); *Scott v. Rosenberg*, 702 F.2d 1263, 1273-74 (9th Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984).

Any reluctance to apply this teaching is lessened by the nature of the conflict in this case. Both the Townleys and Pelvas seek to pursue a religious practice. Where the practices of employer and employee conflict, as in this case, it is not inappropriate to require the employer, who structures the workplace to a substantial degree, to travel the extra mile in adjusting its free exercise rights, if any, to accommodate the employee's Title VII rights.[17]

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[17] This does not mean that statutory rights generally are entitled to primacy over First Amendment rights. We only address the facts of this case.

The transcendent principle in cases of this sort is accommodation. Where the religious practices of employers, such as the Townleys, and employees conflict, Title VII does not, and could not, require individual employers to abandon their religion. Rather, Title VII attempts to reach a mutual accommodation of the conflicting religious practices. This is consistent with the First Amendment's goal of ensuring religious freedom in a society with many different religions and religious groups.

Therefore, we hold that, as applied in this case by the district court, Title VII's requirement of religious accommodation does not unduly burden the Townleys' free exercise rights save in one respect. The district court simply enjoined *all* mandatory services at Townley's Eloy plant. We believe the district court's decree was too broad. The goal of Title VII is served by protecting only those who have religious objections to the services. To protect those who do not have such objecitons is not necessary. Nor do we think that to require that the service be voluntary as to all employees, whether that is their wish or not, is necessary to further the purposes of Title VII. Following this decision, it is not likely that fear of intimidation will suppress requests to be excused on religious grounds. Obviously such requests must be honored by both Townley and the Townleys. Therefore, on remand the district court should frame the injunction accordingly.[18]

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[18] When the district court entered its judgment in the constructive discharge case, it also found Townley in contempt of its original injunction and modified that injunction in several ways. We granted Townley's motion for emergency stay of the district court's modification of its order. We said that it was likely that the modification exceeded the court's jurisdiction over the matters appealed, which is limited to preserving the status quo. *See McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982). We do not give the court detailed instructions on how to draft the injunction on remand. We recognize that Title VII gives the court

Townley's request for attorney's fees is denied. Each party shall bear its own costs on appeal.

We affirm in part and reverse and remand in part.

NOONAN, Circuit Judge, dissenting:

In the performance of its mission in this case, the EEOC is asserting a position that, like the Townley Manufacturing Company's, must find its roots in the First Amendment. The right to believe necessarily implies the right not to believe. Conscience cannot be governmentally coerced. The Free Exercise Clause embraces the atheist with the orthodox. *Torcaso v. Watkins*, 367 U.S. 488 (1961). To exempt an activity from governmental regulation because of its religious nature is to accord a benefit to religion. *Corporation of Presiding Bishop v. Amos*, —— U.S. ——, ——, 107 S. Ct. 2862 at 2874 (1987) (O'Connor, J., concurring). The EEOC could not exempt the Townley Manufacturing Company to the disadvantage of Pelvas if the effect of exemption were to coerce Pelvas to practice the company's religion or to give up his own.

No such showing of coercion has been made. According to Pelvas he was explicitly told that if he attended the prescribed meetings he could wear ear plugs and read a book or sleep. Wearing ear plus, he was not exposed to hearing a word of doctrine subversive of his atheism. Reading a book or sleeping, he was not participating in any form of worship.

One can readily imagine gatherings of worshippers where merely entering the church or crossing the temple

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discretion to fashion appropriate equitable relief, 42 U.S.C. § 2000e-5(g), and we simply remind the court that Title VII's protections in this case extend only to those employees and prospective employees who have religious objections to attending the devotional services. We also note that as Title VII's protections are not limited to the employees of Townley's Eloy plant, the district court's injunction should not be so limited either.

door in their company would be a symbolic act committing one to worship. Compulsion to attend such gatherings would be deeply offensive to the conscience. One can readily imagine schoolchildren summoned to an auditorium and subjected to religious propaganda. Compulsion of the children would be equally obnoxious to religious freedom. But the gatherings to which Pelvas has objected took place on company property during company time; and he was no child but a mature man. Presence at the gathering was not a religious act nor, as far as the record shows, a symbolic association with worship nor subjection to a religious message. Indeed what Pelvas was permitted to do was the antithesis of worship, the opposite of indoctrination. He was allowed to disassociate himself in the most public way from the devotional services that were conducted. He was allowed to turn off and shut out the inspirational message. If he had been discharged or penalized or even ostracized for such behavior he and the EEOC would have cause for complaint. But in fact there has been no showing that such acts as he was permitted to perform, contemptuous as they were of the services, have been or would have been the subject of discipline or disadvantage to Pelvas. The Townley Manufacturing Company has already accommodated Pelvas' conscientious unwillingness to participate in its services.

The court appears to gloss § 701(j) to mean that the employer must accept the employee's proposed accommodation unless the employee's proposal causes undue hardship. That is not the law: "By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. . . . Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end." *Ansonio Bd. of Education v. Philbrook*, —— U.S. ——, ——, 107 S. Ct. 367, 372 (1986); *see also Hudson v. Western Airlines*, —— F.2d —— No. 87-6296, slip op. (9th Cir. July 1, 1988).

Accommodation has been accomplished but has not been acknowledged. Ignoring what Townley has allowed, the court declares, ironically or paradoxically, "the transcendent principle in cases of this sort is accommodation." Has accommodation ever been raised to such an eminence? Transcendent principles are those that rise above the here and now. Transcendent principles link human beings to shared goods of the spirit and their transtemporal destiny. Transcendent principle in the context of this case is the right of each person to worship God as his or her conscience determines.

That transcendent principle is at the center of the Religious Clauses embodied in the First Amendment to the Constitution. The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that Townley Manufacturing Company rightly invokes. Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. *Amos, supra* (1987); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Kedroff v. St. Nicholas Cathedral*, 334 U.S. 94 (1952). Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, *Hague v. CIO*, 307 U.S. 496 (1939), so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.

The First Amendment does not say that only one kind of corporation enjoys this right. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion. All persons—and under our Constitution all corporations are persons—are free. A statute cannot subtract from their freedom.

If it were otherwise, we would be back to the bad old days when state governments insisted that religious organizations incorporate in accordance with state law if they wanted to enjoy the benefits made available by the state. *E.g., Barnes v. First Parish of Falmouth*, 6 Mass. 401 (1810). *Barnes* attempted to force state incorporation upon Baptists who believed that incorporation was unChristian surrender to the state. *See* 2 McLaughlin, *New England Dissent 1630-1833* 1088 (1971). *Barnes* was possible only in a jurisdiction that frankly recognized a church established by the state. The *Barnes* court could insist on the form prescribed by the state because the court could celebrate "this religion, as understood by Protestants . . . [which] was by the people established as a fundamental and essential part of their constitution." *Barnes, supra*, at 406. Such establishment, such forcing of a governmentally chosen form upon religious activity, is incompatible with the Religious Clauses.

True, Congress may create a bright line and exempt from regulation all of the nonprofit activity of religious corporations. *Amos, supra.* The reason is that regulation would chill religious organizations if they had to speculate which of their nonprofit activities a court would label religious. *Id.* at 2872-73 (Brennan, J., concurring). That a bright line may constitutionally be created does not mean that on a case-by-case basis other activities, asserted to be religious, may not be found to fall within the First Amendment's protection.

Amos did not pretend to decide whether the business activity of a religious corporation should be exempted, *see id.* at 2875 (O'Connor, J., concurring); and we do not face here the question unresolved in *Amos.* But we meet a parallel question: what exemption from governmental interference is required by the First Amendment as to the religious activity of a business corporation?

The First Amendment by its express terms is directed against *Congress* prohibiting the free exercise of religion.

Remarkably and regrettably when Congress has found a national interest to be of sufficient importance to be incorporated into federal legislation and that legislation has conflicted with the free exercise of religion, the Supreme Court of the United States has uniformly found the national interest to outweigh the claims of conscience and permitted Congress to prohibit the free exercise of religion in conflict with the legislation. This bleak record is mitigated because the Court has sometimes reinterpreted a federal statute to accommodate the Free Exercise claim. *E.g., United States v. Seeger*, 380 U.S. 163 (1965); *Giruoard v. United States*, 328 U.S. 61 (1946). But where the Free Exercise claim has been pressed and the federal statute not glossed, the result has not been good for Free Exercise. School boards, municipalities, states have been subjected to the standard set by the Religious Clauses. When Congress has legislated, the legislative objective has overborne the claims of conscience. The Amish have been forced to contribute to Social Security despite their contention that their religion prescribed other ways of caring for the community. *United States v. Lee*, 455 U.S. 252 (1982). Conscientious objectors to war have been compelled to serve in the armed forces contrary to their most deeply held principles. *Negre v. Larsen*, 401 U.S. 437 (1971). The property of the Mormon church has been confiscated by congressional command in order to force conformity contrary to the religious principles of the afflicted church. *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890). In all, in nineteen cases the court has upheld congressional legislation in the face of the Free Exercise Clause. The courts of appeal have followed suit. *See* Appendix to this dissent.

Secular men and women take secular values seriously. Men and women of the world believe that the world's business is important. When Congress elevates this busi-

ness to a national priority it has been all too easy for officers of the government and even judges to ignore the countervailing command of the Constitution. In the Supreme Court the Constitution has been no shield for the spirit when Congress has ordained that the spirit must yield to secular needs.

Despite these lessons of history it remains possible to say that the Religious Clauses are unimpaired in what they require of civilized government. The weighing of the claims of Congress is not to be carried out with a tilt in favor of Congress. The result should not be foreordained by Congress choosing a secular value as overriding. The Free Exercise Clause requires solicitude for the religious values that are invaded.

Insensitive to its entry on sacred ground, the EEOC in this case has proceeded as though it had but to invoke the congressional mandate and all opposition should cease. The EEOC has had success in eliminating racial bigotry. It has proceeded in this case as though the defendant was simply one more racist bigot. The agency has suffered from the scotopia of a bureaucracy. The agency must indeed vindicate the claims of conscience subjected to religious discrimination. The agency must do so with the utmost respect for the religious claims upon which its action intrudes.

Respect for the religious beliefs of others is particularly difficult when one does not share these beliefs. Judges are no more immune than congressmen from prejudices that are not only officious and overt but subtle and latent and incline one to take less than seriously notions of religious belief that depart markedly from one's own or some assumed norm. The First Amendment is an effort, not entirely forlorn, to interpose a bulwark between the prejudices of any official, legislator or judge and the stirrings of the spirit.

The agency and the court appear to assume that there must be a sharp division between secular activity and religious activity. Such a sharp division finds nourishment in one of our cases. *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1441 (9th Cir. 1983). But of course such a dichotomy is a species of theology. The theological position is that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time. Such a split is attractive to some religious persons. It is repudiated by many, especially those who seek to integrate their lives and to integrate their activities. Among those who repudiate this theology is the Townley Manufacturing Company.

The undisputed facts are that Jake and Helen Townley made an agreement with God that their company would be "a faith-operated business whose primary purpose would be to share the Gospel of the Lord Jesus Christ and to remain completely dedicated to God's service." The integration of work and religious purpose that the Townleys and their company seek was captured centuries ago in exquisite devotional verse:

> Who sweeps a room as for Thy cause
> Makes that, and the action, fine.
>
> George Herbert, "The Elixir," *The Writings of George Herbert*, 185.

As part of the Townleys' covenant with God they agreed "to acknowledge God's blessing upon the business and his continued direction of the business and his use of the business." The fundamental purpose of their company is "to stand as a testimony to God's blessing to all persons who will operate their business according to Christian principles." In furtherance of that purpose the company conducts the services of which Pelvas complains.

For an agency of the government, or Congress, or a court to say that the Townleys are mistaken in their be-

liefs or that the Townley Manufacturing Company cannot have the purpose ascribed to it and shall not carry out the program of devotion it has set up is to make a theological judgment—a theological judgment fairly characterized as reflecting either a secularism skeptical of God's existence and power or a species of deism that radically isolates God from the world that believers believe God created and animates and directs. The First Amendment prohibits an agency of government, or Congress, or even a court, from imposing such a theological judgment to curb the free exercise of religion.

APPENDIX

The Federal Appellate Courts and the Free Exercise Clause

SUPREME COURT CASES *

A. Decisions of the Supreme Court of the United States Sustaining Congressional Legislation Against A Claim That The Legislation Violated The Free Exercise Clause.

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
Lyng v. Northwest Indian Cemetery Protective Assn.	108 S. Ct. 1319 (1988)	federal forest service plans	no
Bowen v. Roy	476 U.S. 693 (1986)	federal welfare requirements	no
Goldman v. Weinberger	475 U.S. 503 (1986)	federal military regulations	no
Alamo v. Secretary of Labor	471 U.S. 290 (1985)	federal labor statute	no
Wayte v. United States	470 U.S. 598 (1985)	federal conscription provision	no
Bob Jones University v. United States	461 U.S. 574 (1983)	federal tax provision	no
United States v. Lee	455 U.S. 252 (1982)	federal tax provision	no

* This appendix lists cases that were located by a LEXIS search (Confed file; "free exercise" w/10 unconstit; and relig!) conducted in August, 1988 by my lawclerk, Bernard J. Cassidy, and is adopted by me and made a part of my dissent. Additional cases that came to light after the LEXIS search have been included. The subsequent history of each case has been omitted, except to indicate if the case has been overruled.

Trans World Airlines, Inc. v. Hardison	432 U.S. 63 (1977)	federal antidiscrimination statute	no
United States v. American Friends Service Committee	419 U.S. 7 (1974)	federal tax provision	no
Johnson v. Robison	415 U.S. 361 (1974)	federal veterans' statute	no
Gillette v. United States	401 U.S. 437 (1971)	federal conscription provision	no
United States v. Seegr	380 U.S. 163 (1965)	federal conscription provision	no
Gara v. United States	340 U.S. 857 (1950)	federal conscription provision	no (affirmed by an equally divided court)
United States v. Ballard	322 U.S. 78 (1944)	federal mail fraud statutes	no (as applied by district ct) (reversed on other grounds, 329 U.S. 187)
Selective Draft Law Cases	245 U.S. 366 (1918)	federal conscription provision	no
United States ex rel Turner v. Williams	194 U.S. 279 (1904)	federal immigration statute	no
Morman Church v. United States	136 U.S. 1 (1890)	federal disincorporation	no
Davis v. Beason	133 U.S. 333 (1890)	territorial polygamy statute (authored by Congress)	no
Reynolds v. United States	98 U.S. 145 (1878 term)	territorial polygamy statute (authored by Congress)	no

B. Decisions of the Supreme Court of the United States Sustaining Action Against A Claim That The Action Violated The Free Exercise Clause.

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
Board of Education v. Allen	392 U.S. 236 (1968)	state educational statute	no
Poulos v. New Hampshire	345 U.S. 395 (1953)	city licensing ordinance	no
Zorach v. Clauson	343 U.S. 306 (1952)	state educational statute	no
In re Summers	325 U.S. 561 (1945)	state bar provision	no
Prince v. Massachusetts	321 U.S. 158 (1944)	state employment statute	no
Minersville School District v. Gobitis	310 U.S. 586 (1940)	state educational provision	no (overruled, 319 U.S. 624)
Hamilton v. University of California	293 U.S. 245 (1934)	state educational regulation	no

C. Decisions of the Supreme Court of the United States Invalidating State Action As A Violation of the Free Exercise Clause.

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
Jensen v. Quaring	472 U.S. 478 (1985)	state licensing regulation	yes (affirmed by an equally divided court)
Thomas v. Review Board	450 U.S. 707 (1981)	state unemployment statute	yes
McDaniel v. Paty	435 U.S. 618 (1978)	state constitutional provision	yes
Serbian Orthodox Diocese v. Millvojovich	426 U.S. 696 (1976)	state judicial decree	yes
Wisconsin v. Voder	406 U.S. 205 (1972)	state educational statute	yes
Sherbert v. Verner	374 U.S. 398 (1963)	state unemployment statute	yes
Torcaso v. Watkins	367 U.S. 488 (1961)	state constitutional provision	yes
Kedroff v. St. Nicholas Cathedral	344 U.S. 94 (1952)	state corporations statute	yes
Kuns v. New York	340 U.S. 290 (1951)	city public worship ordinance	yes (speech grounds)
Marsh v. Alabama	326 U.S. 501 (1946)	state trespass statute	yes
Tucker v. Texas	326 U.S. 517 (1946)	state trespass statute	yes
Fellett v. McCormick	321 U.S. 573 (1944)	city license ordinance	yes
West Virginia State Board of Education v. Barnette	319 U.S. 624 (1943)	state educational regulation	yes
Murdock v. Pennsylvania	319 U.S. 105 (1943)	state licensing ordinance	yes
Jones v. Opelika	319 U.S. 103 (1943)	city licensing ordinance	yes
Cantwell v. Connecticut	310 U.S. 296 (1940)	state solicitation statute	yes

D. Decisions of the United States Courts of Appeals Sustaining Congressional Legislation Against A Claim That the Legislation Violated The Free Exercise Clause.

U.S. COURT OF APPEALS

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
United States v. Slabaugh	848 F.2d 113 (8th Cir. 1988)	federal marshal's regulation	no
Hernandez v. Commissioner of Internal Revenue	819 F.2d 1212 (1st Cir. 1987)	federal tax provision	no
Nelson v. I.R.S.	796 F.2d 164 (6th Cir. 1986)	federal tax provision	no
United States v. Allen	760 F.2d 447 (2d Cir. 1985)	federal property statute	no
Volunteers of America v. N.L.R.B.	752 F.2d 345 (8th Cir. 1985)	federal agency order	no
United States v. Rush	738 F.2d 497 (1st Cir. 1984)	federal drug statute	no
Denver Post v. N.L.R.B.	732 F.2d 769 (10th Cir. 1984)	federal agency order	no
St. Elizabeth Hospital v. N.L.R.B.	708 F.2d 1436 (9th Cir. 1983)	federal labor statute	no
Wilson v. Block	708 F.2d 735 (D.C. Cir. 1983)	federal agency plans	no
United States v. Middleton	690 F.2d 820 (11th Cir. 1982)	federal drug statute	no

Tressler Lutheran Home v. N.L.R.B.	677 F.2d 302 (3d Cir. 1982)	federal agency order	no
E.E.O.C. v. Pacific Press	676 F.2d 1272 (9th Cir. 1982)	federal employment statute	no
N.L.R.B. v. St. Louis Christian Home	663 F.2d 60 (8th Cir. 1981)	federal agency order	no
E.E.O.C. v. Southwestern Baptist	651 F.2d 277 (5th Cir. 1981)	federal employment statute	no
E.E.O.C. v. Mississippi College	626 F.2d 477 (5th Cir. 1980)	federal employment statute	no
Sequoyah v. T.V.A.	620 F.2d 1159 (6th Cir. 1980)	federal dam project	no
United States v. Holmes	614 F.2d 985 (5th Cir. 1980)	federal tax provision	no
United States v. Huss	482 F.2d 38 (2d Cir. 1973)	federal contempt decree	no
Christian Echoes v. United States	470 F.2d 849 (10th Cir. 1972)	federal tax provision	no
Smilow v. United States	465 F.2d 802 (2d Cir. 1972)	federal contempt decree	no (vacated on other grounds, 409 U.S. 944)
McClure v. Salvation Army	460 F.2d 553 (5th Cir. 1972)	federal employment statute	no
United States v. Spears	443 F.2d 895 (5th Cir. 1971)	federal drug statute	no
United States v. Wilson	440 F.2d 382 (8th Cir. 1971)	federal conscription provision	no

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
United States v. Reeb	433 F.2d 381 (9th Cir. 1970)	federal conscription provision	no
Heards v. Commissioner	421 F.2d 846 (9th Cir. 1970)	federal tax provision	no
Leary v. United States	383 F.2d 851 (5th Cir. 1967)	federal drug statute	no (reversed on other grounds, 395 U.S. 6)
Application of Georgetown	331 F.2d 1000 (D.C. Cir. 1964)	federal judicial order	no
Otten v. Staten Island Rapid Transit	229 F.2d 919 (2d Cir. 1956)	federal labor regulation	no
Mitchell v. Pilgrim Holiness Church	210 F.2d 879 (7th Cir. 1954)	federal labor regulation	no
Cannon v. United States	181 F.2d 354 (9th Cir. 1950)	federal conscription provision	no
Roodernko v. United States	147 F.2d 752 (10th Cir. 1945)	federal conscription provision	no
Hopper v. United States	142 F.2d 181 (9th Cir. 1944)	federal conscription provision	no

E. Decision of the United States Courts of Appeals Sustaining State Action Against A Claim The Action Violated The Free Exercise Clause.

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
Wilder v. Bernstein	848 F.2d 1338 (2d Cir. 1988)	state childcare scheme	no
Smith v. North Babylon Bd. of Education	844 F.2d 90 (2d Cir. 1988)	school board regulation	no
Allen v. Toombs	827 F.2d 563 (9th Cir. 1987)	state prison regulation	no
Mozert v. Hawkins	827 F.2d 1058 (6th Cir. 1987)	school board regulation	no
Paul v. Watchtower	819 F.2d 875 (9th Cir. 1987)	state court decree	no
Fellowship Baptist Church v. Benton	815 F.2d 485 (8th Cir. 1987)	state educational statute	no
Phan v. Virginia	806 F.2d 516 (4th Cir. 1986)	state constitutional provision	no
Catholic High School Ass'n v. Culvert	753 F.2d 1161 (2d Cir. 1985)	state labor regulation	no
Pinsker v. Joint District	735 F.2d 388 (10th Cir. 1984)	school district regulation	no
Gross v. Miami Beach	721 F.2d 729 (11th Cir. 1983)	city zoning ordinance	no
Madyun v. Franzen	704 F.2d 954 (7th Cir. 1983)	state prison regulation	no

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
Lakewood Congregation v. Lakewood	699 F.2d 303 (6th Cir. 1983)	city zoning ordinance	no
Int'l Soc. for Krishna Consciousness v. Barger	689 F.2d 541 (5th Cir. 1982)	city solicitation ordinance	no
Menora v. Illinois High School Ass'n	683 F.2d 1030 (7th Cir. 1982)	state educational regulation	no
Walsh v. Louisiana High Athletic Assn.	616 F.2d 152 (5th Cir. 1980)	state educational regulation	no
Int'l Soc. for Krishna Consciousness v. Eaves	601 F.2d 809 (5th Cir. 1979)	municipal solicitation ordinance	no
Evans v. Ciccone	377 F.2d 4 (8th Cir. 1967)	state prison regulation	no
Sostre v. McGinnis	334 F.2d 906 (2d Cir. 1964)	state prison regulations	no

F. Decisions of the United States Courts of Appeals Invalidating State Action As a Violation of the Free Exercise Clause.

Case	Citation	Challenged Matter	Violative of Free Exercise Clause
Murphy v. Missouri Dep't of Corrections	814 F.2d 1252 (8th Cir. 1987)	state prison regulation	yes
Teterud v. Barns	522 F.2d 357 (8th Cir. 1975)	state prison regulation	yes

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2272

DC CV 86-1156 EHC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

vs.

TOWNLEY ENGINEERING & MANUFACTURING COMPANY,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona (Phoenix)

[Filed Oct. 20, 1988]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part and remanded. Each party to bear its own costs on this appeal.

A TRUE COPY
ATTEST Oct. 11, 1988

CATHY A. CATTERSON
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 86-1156- PHX EHC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

TOWNLEY ENGINEERING & MANUFACTURING CO.,
Defendant.

ORDER

[Filed May 11, 1987]

Plaintiff Equal Opportunity Employment Commission has brought this action under Title VII against Defendant Townley Engineering & Manufacturing Co. [Townley], on behalf of Louis Pelvas, a former employee of Townley. The complaint alleges that Townley engaged in an unlawful employment practice by requiring its employees to attend devotional services and that because of this practice Pelvas, a claimed atheist, was constructively discharged. Townley admits its mandatory devotional services but argues that this practice is not unconstitutional and further denies that Pelvas was constructively discharged.

In its motion for summary judgment, EEOC has moved to permanently enjoin Townley from requiring its employees' attendance at devotional services, to reinstate Pelvas, and to award Pelvas back pay. In its cross-motion for summary judgment, Townley has moved to enjoin EEOC from interfering with its devotional services, asserting that it is exempt from the operation of Title VII as a "religious corporation" and for declaratory judgment that Townley is a religious corporation under 28 U.S.C. section 2201. Townley has requested a jury trial on these issues.

The motions have been fully briefed and oral argument was heard.

Discussion

I find that Townley has engaged in unlawful employment practices. An employer must accommodate an employee's religious beliefs or lack thereof, unless the employer can demonstrate that it is unable do so without "undue hardship on the conduct of the employer's business." 42 U.S.C. section 2000e(j); *Young v. Southwestern Savings & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975). Clearly, accommodating Pelvas's asserted atheistic beliefs would not have created an undue business hardship for Townley. Excusing Pelvas from the mandatory devotional services would have cost Townley nothing in the operation of its business activities, and would not have disrupted other workers. *See Tooley v. Martin-Marietta Corp.*, 648 F.2d 1238, 1243 (9th Cir. 1981), *citing Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 406-07 (9th Cir. 1978) *cert. denied*, 442 U.S. 921 (1979).

The religious corporation exemption must be narrowly construed. *See* 42 U.S.C. 2000e-1. The state may not favor religious groups when "they themselves choose to be submerged, for profit or power, in the 'all-embracing

secularism' of the corporate economy." *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 56 (D.C.Cir.), *cert. denied*, 419 U.S. 996 (1974). Townley is not a religious organization within the purview of the statutory exceptions or relevant case authority.

Townley is a closely held-for-profit corporation headquartered in Florida, with plants in several other states. Townley's Eloy, Arizona plant is the site of this complaint. Townley's founders, Jake and Helen Townley [the Townleys], are born-again Christians, and are devoted to charitable works and sharing their religious gospel.

The corporation's purpose, as stated in the articles of incorporation, is the manufacture of mining equipment. There is no mention of a religious purpose. Townley also has not sought a tax exemption under 26 U.S.C. section 501(c)(3).

While the term "religious corporation" has not been defined by the case law, it is clear that any reasonable construction of the exemption would not include a for-profit corporation whose only religious characteristic is the beliefs of its stockholders. *See EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (religious school was not exempt from application of Title VII to discriminatory benefit practices on the basis of sex); *EEOC v. Pacific Press Publ. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (non-profit religious publishing house was not exempt from application of Title VII to discriminatory sexually-based compensation practices; *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (relationship between religious education institution and its faculty was not exempt from application of Title VII).

Even if Townley is a religious corporation, the relationship between the job performed by Pelvas and the "religious tenets" of Townley is insufficient to support a

religious activities exemption. A three prong test for use as an analytical framework for determining, in the context of a First Amendment discrimination suit, whether an activity is religious is stated in *Amos v. Corporation of Presiding Bishop*, 594 F. Supp. 791, 799 (D. Utah 1984) [*Amos I*] and 618 F. Supp. 1013 (D. Utah 1985) [*Amos II*], *appeal pending*, 107 S. Ct. 396, 924, 1276 (1987). See also 55 U.S.L.W. 3615 (March 17, 1987). I consider this test appropriate to the instant case.

The Townley corporation might meet the first prong, that of a close tie between the religious organization and the activity at issue—the plant in Eloy—with regard to areas such as financial affairs, day-to-day operations and management. *Amos I*, 594 F. Supp. at 799.

Under the *Amos I* test, if there is a substantial connection between the primary function of the activity in question and the religious rituals or tenets of the religious organization and a close tie under the first prong, then the activity is religious. *Id.* Here the primary function of Townley is the manufacture of mining equipment and making a profit. Assuming relevance to the Townleys' religious beliefs, they have not asserted that one of the tenets of their religion is to make profits by manufacturing mining equipment. The fact that those profits may, in part, be committed to religious purposes does not serve to convert the secular corporation into a religious institution. The nexus between the religious tenets of the Townley's and the activity at issue is tenuous at best.

If the first test is either close or remote and the nexus in the second prong is tenuous or non-existent, then the court must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the organization *Amos I*, 594 F. Supp. at 799. Pelvas is a machine tool operator. He has no duties involving the performance of religious rituals.

To apply the religious activities exemption so as to allow "religious discrimination in secular, non-religious activities is to advance religion in violation of the establishment clause of the first amendment to the United States Constitution." *Id.* at 828. A court may determine what constitutes religious activity, without creating excessive governmental entanglement with religion in violation of the First Amendment. *Id.* at 814. *See also Lemon v. Kurtzman*, 403 U.S. 602 (1971) (three tests for determining whether a statute violates the Establishment Clause: (1) secular legislative purpose; (2) principal or primary effect neither advances nor inhibits religion; and (3) does not "foster an excessive governmental entanglement with religion").

> A determination of what is religious activity and what is not does not affect "the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.

Amos I, 594 F. Supp. at 814, citing *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milovojevich*, 426 U.S. 696 (1976). Clearly, mine equipment manufacturing operations are not religious activities, so applying Title VII to this activity is proper, regardless of whether Townley is a religious organization.

This court does not resolve the issue of whether Townley has free exercise rights, because it is clear that Townley's free exercise rights would not be violated, assuming that it had them. The Ninth Circuit considered the magnitude of Title VII's impact on the exercise of a religious belief in *EEOC v. Fremont Christian School*, 781 F.2d at 1367, and concluded that the statute did not violate the Free Exercise Clause.

A material fact issue exists as to whether Mr. Pelvas was constructively discharged. Pelvas was not overtly

disciplined for his objection to the devotional services. *See Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985), *rev'd on other grounds*, 107 S. Ct. 367 (1986). Defendant asserts that Pelvas's job in Eloy was terminated because the machines that Pelvas worked on were being transferred to Florida. EEOC has not shown that Townley lacked a valid business reason for this move. Nor has evidence been presented by way of as affidavit that Pelvas was otherwise prejudiced in his employment with Townley due to his claimed atheistic beliefs.

This Court lacks jurisdiction over defendant's counterclaim for declaratory relief. Title 28, United States Code, section 2201 does not provide an independent basis for subject matter jurisdiction. Nor can the United States be sued unless it consents to such suit. *Honda v. Clark*, 386 U.S. 484 (1967). Such consent cannot be derived from Title VII.

Jury trials are allowed for claims where compensatory and punitive damages are the remedy, as well as claims arising under a statute which specifically provides for trial by jury. Defendant asserts that its counterclaim for declaratory relief entitles it to a jury trial. Contrary to defendant's assertions, 28 U.S.C. section 2201 does not provide for an independent right to a jury trial. When an issue is common to both legal and equitable claims in the same proceeding, it must be tried first to a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). But a jury trial is not required in a proceeding seeking purely equitable relief. Neither the counterclaim nor the original complaint asserts a legal claim. Because no legal claim has been asserted, and there is no right to a jury trial on purely equitable claims, Townley is not entitled to a jury trial.

Accordingly,

IT IS ORDERED granting plaintiff's motion for summary judgment on the allegation of unlawful employment practices, permanently enjoining Townley from continuing mandatory devotional exercises for its employees at its Eloy, Arizona plant, and dismissing defendant's counterclaim for declaratory relief for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

IT IS FURTHER ORDERED denying plaintiff's motion for reinstatement and back pay, the court having found that a material fact issue exists as to whether Pelvas was constructively discharged as well as whether he terminated his employment for other than religious reasons.

IT IS FURTHER ORDERED denying as moot plaintiff's motion to strike, the court not having relied on the challenged portions of the Gamez and Scott affidavits in ruling on the issue of constructive discharge. Affidavits submitted after the hearing on March 9, 1987, were not determinative of any issue in this proceeding and were not considered in ruling on the motions for summary judgment.

IT IS FURTHER ORDERED denying defendant's motion for jury trial, neither the complaint nor counterclaim having stated any legal issues triable to a jury.

IT IS FURTHER ORDERED requiring on or before August 28, 1987, the parties to file with the Court their proposed pretrial order pursuant to Local Rule 42(c).

DATED this 8th day of May, 1987.

/s/ Earl H. Carroll
EARL H. CARROLL
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV 86-1156 PHX EHC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

TOWNLEY ENGINEERING & MANUFACTURING CO.,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT AND PERMANENT INJUNCTION

[Filed Apr. 21, 1988]

This action having been tried before the Court, the Court now enters its findings of fact and conclusions of law regarding this matter pursuant to Fed. R. Civ. P. 52(a), together with its order for Judgment and Permanent Injunction.

Findings of Fact

Since at least 1973, Townley Engineering & Manufacturing Co. (Townley) has continuously been and is presently a closely held for profit Florida corporation. It does business in the State of Arizona, and has fifteen employees at its Eloy, Arizona plant. Defendant has plants

in other states. The home office is in Candler, Florida. Defendant is an employer engaged in an industry affecting commerce within the meaning of section 701(b), (g) and (h) of Title VII, Title 42 United States Code section 2000e(b), (g) and (h). J.O. (Jake) and Helen Townley, founders of the corporation, are self-professed, born-again Christians, devoted to sharing the Gospel.

Louis Pelvas was employed at Townley in Eloy from November 1, 1979 through December 14, 1984. Louis Pelvas does not believe in God and states that there is no place for religion in his life.

Townley has conducted mandatory religious services for employees at its plant in Candler, Florida for approximately 20 years prior to the institution of such services at the Eloy plant. In June of 1984 Townley commenced mandatory religious services for its employees at the Eloy plant. *See* Plaintiff's Exhibit 32. Max Scott, Pelvas' supervisor, informed Pelvas of the institution of these services and said that such services would be mandatory. Pelvas voiced an objection to the services. Scott told Pelvas that he must attend the services but that he could read or sleep during the services. Pelvas attended the services. He never refused to attend the services. Instead he read or listened to his radio during the services.

After several months of attending the services, Pelvas filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in late October, 1984 alleging discrimination in employment because of religion. *See* Plaintiff's Exhibit 1. The EEOC investigated the charge and on December 11, 1984 conducted an on-site investigation of the Eloy plant which included attendance at the weekly service.

December 14, 1984 was Pelvas' last day of employment with Townley. On that day Scott called Pelvas into his office close to quitting time and told him to pick up his

belongings as the machinery on which Pelvas worked was being shipped to Florida the next day. Additionally, Scott handed Pelvas a paycheck which covered pay for the month of December. As Pelvas was gathering his tools, Scott informed Pelvas that he had the option of transferring to the Florida plant. Pelvas impliedly declined the offer. Pelvas knew that mandatory services were also conducted in Florida.

Pelvas had previously been requested in 1983 to go to the Florida plant for a few weeks to train employees on certain equipment which had been transferred to Florida from Eloy. Pelvas did not go at that time, testifying he did not like to fly, and as the plant in Eloy was busy and he was needed there. Pelvas has a sinus condition which flares up in damp weather and it is reasonable to infer that he did not want to have this problem occur in Florida. (See his affidavit opposing transfer of this case to Florida for trial). Although mandatory religious services have been conducted in Florida for more than twenty years, Pelvas did not mention attendance at these services as a reason when he declined to go to Florida the first time.

Pelvas was aware prior to December of 1984 that the equipment on which he worked would eventually be moved to Florida and installed in a foundry being built at the Candler plant. On two other occasions between 1979 and 1984 equipment had been moved from Eloy to Florida. Transfer of all of the equipment was delayed until full payment of the purchase price by Townley. Additionally, each time Mr. Townley visited the Eloy plant there were discussions regarding the movement of the equipment to Florida and Pelvas was aware of these discussions.

The parties have stipulated that the equipment was moved to Florida in December of 1984 for valid business purposes.

Pelvas declined the transfer to Florida for reasons concerning his health, his established home in the Eloy area, the religious services and his unwillingness to adjust to a new employment atmosphere. Mrs. Pelvas did not want to relocate to Florida and if she had been consulted by her husband she would have refused to move. The implications of the mandatory religious services in Florida were not a major obstacle to his going to Florida.

To accommodate Pelvas' objections to the religious services, Scott later offered Pelvas a job on the second shift in Florida. No mandatory religious services were conducted on the second shift. Pelvas declined this offer also as he had always worked the first shift and did not want to change. Pelvas was also unwilling to actively seek other work in the Eloy-Casa Grande area that might conflict with his preferred work schedule.

Pelvas filed a second charge of discrimination with the EEOC on December 19, 1984 alleging constructive discharge and retaliation. *See* Plaintiff's Exhibit 44.

After leaving Townley, Pelvas began seeking other employment. Pelvas concentrated his job search in the Eloy and Casa Grande areas. Pelvas applied, either directly or by filing applications through a state employment agency, with such companies as Happy Motors, Benco, and Meridith Buddha but received no response. Pelvas obtained employment with Valley Pump, where he had been employed prior to his job at Townley. Pelvas began his job with Valley Pump on March 1, 1985. The record does not reflect the date he re-applied for a job at Valley Pump.

On April 19, 1985, the EEOC issued its letter of determination regarding the first claim filed by Pelvas. The EEOC determined there was reasonable cause to believe that Townley engaged in an unlawful employment practice by requiring its employees to attend nondenominational religious services. *See* Plaintiff's Exhibit 28.

On June 12, 1985 the EEOC issued its letter of determination regarding the second claim filed by Pelvas. The EEOC determined there was reasonable cause to believe that Pelvas had been constructively discharged because of his refusal to accept Townley's conditions of employment. However, the EEOC did not find reasonable cause to believe that the allegation of retaliation was true. *See* Plaintiff's Exhibit 45.

Pelvas went to work for Valley Pump earning $7.50 per hour. In March of 1986 Pelvas voluntarily reduced his hours at Valley Pump from forty hours per week to twenty hours per week in order to begin collecting social security at age 65.

On May 11, 1987 this Court issued a preliminary injunction enjoining Townley "from continuing mandatory devotional exercises at its Eloy plant." Townley's request to stay this order pending an interlocutory appeal was denied.

The weekly devotional services are, in effect, still being conducted at Eloy. A notice was posted in late August, 1987, which informs the employees that if anyone objects to a minister speaking at the meetings, the minister will not speak. The notice states that if objections to a religious service are received the meetings will continue to be conducted but that business will be discussed instead. *See* Defendant's Exhibit J. The practical effect is that attendance at the meetings is still mandatory and religious services are routinely conducted.

Conclusions of Law

Title 42 United States Code section 2000e-2(a) makes it an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual because of such individual's religion. Section 2000e(j) defines religion to include all aspects of religious observance and practice as well as belief, unless the employer demonstrates that he is unable to reasonably accommo-

date the employees' religious observance without undue hardship on the conduct of the employer's business. The intent of the statute was to make it an unlawful employment practice for an employer not to make reasonable accommodation, short of undue hardship for the religious practices of his employees. *Anderson v. General Dynamics*, 589 F.2d 397, 400 (9th Cir. 1978).

To establish a prima facia case of religious discrimination, Pelvas must prove that he has a bona fide religious belief, or lack thereof, which runs contrary to an employment practice followed by his employer, that he informed his employer that his religious belief was in conflict with the employment practice and that he was discharged or threatened with discharge for refusal to follow the employment practice. *Anderson*, 589 F.2d at 401; *Burns v. Southern Pacific Trans.*, 589 F.2d 403, 405 (9th Cir. 1978), *cert. denied* 439 U.S. 1072, 99 S.Ct. 843 (1979). Pelvas is a disbeliever of any religious beliefs, as he has the right to be under the First Amendment. As stated in *Wallace v. Jaffree*, —— U.S. ——, 105 S.Ct. 2479, 2488 (1985):

> Just as the right to speak and the right to refrain from speaking are complimentary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amend-

> ment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among religions—to encompass intolerance of the disbeliever and the uncertain.

Townley conducted mandatory religious services at its plant in Eloy. Pelvas informed his employer that he objected to the religious services. His employer responded that attendance was mandatory, although, Pelvas could read, sleep or listen to his radio during the services.

The last requirement provides that plaintiff prove Pelvas was discharged or threatened with discharge for refusal to follow the employment practice. If, in considering the totality of the circumstances, a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable and discriminatory working conditions, a constructive discharge is said to have occurred. *Watson v. Nationwide Insurance*, 823 F.2d 360, 361 (9th Cir. 1987); *Ford v. Alfaro*, 785 F.2d 835, 841 (9th Cir. 1986). This test establishes an objective standard. Pelvas need not show that his employer subjectively intended to force him to resign. *Watson*, 823 F.2d at 361.

Pelvas did not refuse to attend the services. As he testified, "I went along with it, yes." Pelvas was not overtly disciplined or fired for voicing objections to the religious services.

Pelvas complained to a Casa Grande newspaper in September of 1984 and the paper ran a story about the

Eloy plant. Pelvas was not disciplined or threatened concerning this activity. Pelvas learned about the EEOC and its functions from the paper.

Max Scott called Pelvas into his office on December 14, 1984 and told him to gather up his personal belongings. At the same time Scott handed Pelvas a paycheck which covered the month of December. Scott offered Pelvas a job in the Florida plant. Pelvas' job at Eloy was effectively terminated when the machinery on which he worked was transferred to Florida. The machinery was moved for a valid business purpose. Scott offered Pelvas the opportunity to transfer to Florida on the second shift and Pelvas declined. Pelvas did not want to move to Florida.

Pelvas was not discharged for refusing to attend the mandatory religious services.

Taking all of the circumstances into consideration, I conclude that Pelvas was not forced to quit because of intolerable and discriminatory working conditions. Pelvas was not constructively discharged from his job with Townley and is not entitled to back pay.

In reaching this decision, I have necessarily given consideration to both Pelvas' and Townley's contentions concerning why Pelvas refused—by doing nothing—Townley's offer of a position in Florida. *Martinez v. El Paso County*, 710 F.2d 1102, 1105 (5th Cir. 1983). As the transfer of all the equipment became probable, Pelvas initiated an EEOC complaint and continued to work at the plant thus minimizing any damages that might accrue from the discriminatory practices of Townley. It was appropriate for him to follow this course of action. *Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982). He could have continued this procedure by going with the equipment to Florida. He elected not to do so for the reasons previously stated in this order.

Contempt

During the course of the trial the Court also heard evidence regarding plaintiff's petition for an order to show cause why defendant should not be held in contempt for violating the injunction imposed by this Court in May.

On May 11, 1987 this Court entered an order finding that Townley engaged in unlawful employment practices and ". . . permanently enjoining Townley from continuing mandatory devotional exercises for its employees at its Eloy, Arizona plant. . ." Townley is still conducting weekly meetings for its employees at Eloy; however, they have informed their employees that if anyone objects to a minister speaking at the meetings, the minister will not speak and business will then be conducted at the meetings. Apparently no employees have objected to the services and the devotionals are continuing on a weekly basis.

Townley's actions in ignoring this Court's order for several months and then instituting its "waiver" program constitutes a contempt of this Court's order of May 11, 1987. The Minister's remarks at the December 11, 1987 devotional service referring to the actions of others directed towards stopping those services and the zeal with which the Townley's proclaim their personal Christian beliefs, would do little to encourage an objection to having devotional services continue at the Eloy plant on a putative voluntary basis. It should be noted that Townley's employee handbook continues to cite failure to attend devotional services as a reason for discharge. *See* Plaintiff's Exhibit 32. While the entity may be different, the practical effect of the August, 1987 notice at Townley's Eloy plant is the same as noted in *Wallace v. Jaffree*, —— U.S. ——, 105 S.Ct. 2479, 2492 n.51 (1985), *citing Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1267 (1962):

> "Moreover, this Court has noted that '[w]hen the power, prestige and financial support of government

> is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' "

Title 42 United States code section 20003-5(g) allows a court to enter injunctions in an employment discrimination action. This section plainly expresses Congress' intent to vest the district courts with broad discretion to award the appropriate equitable relief to remedy unlawful discrimination. *Local 28 of Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3035 (1986). This section does not say that a court may order relief only for actual victims of past discrimination. *Local 28*, 106 S.Ct. at 3035.

Although defendant may have the right to conduct safety and production meetings and to require its employees' attendance at such meetings, defendant does not have the right to conduct mandatory religious services and require attendance at those services. It is unlikely that employees of such a small company would feel comfortable in objecting to a practice on which their employer places so much emphasis. In order to adequately accommodate the constitutional rights of its employees, attendance at the religious services should be completely voluntary. The religious services should be held at a separate time or day from the business meeting so that an employee does not have to object to listening to a minister. A mandatory business meeting may be conducted by defendant. A separate, voluntary religious service may also be conducted. No adverse action may be taken against employees who do not attend voluntary religious services. Defendant should orally and in writing inform all present employees and all fuutre employees of its practice regarding any voluntary religious service.

As this Court has jurisdiction over Townley Engineering & Manufacturing Co., and as Townley is engaging in

unlawful employment practices at plants other than its plant in Eloy, this Court's order of final injunction shall include all Townley plants. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 355 (5th Cir. 1977), *cert. denied* 434 U.S. 1034, 98 S.Ct. 767 (1978) (Unless the Court can discern and identify clear and convincing evidence that there is no reasonable probability of further noncompliance, the district court should enter a broad injunction applicable to all facilities and programs.)

ACCORDINGLY,

IT IS ORDERED granting judgment in favor of defendant and against plaintiff on the constructive discharge claim.

IT IS FURTHER ORDERED granting plaintiff's motion for contempt of this Court's order of May 11, 1987.

IT IS FURTHER ORDERED that defendant pay a fine of $10,000 to the Clerk of the Court for the United States District of Arizona for failure to comply with the Court's May 11, 1987 order such fine to be paid twenty (20) days from the entry of this order.

IT IS FURTHER ORDERED that Townley Engineering and Manufacturing Company and its chief executive officer, shall pay a fine of $10,000 for any subsequent violation of this order to the Clerk of the Court for the United States District of Arizona.

IT IS FURTHER ORDERED that the defendant is enjoined from having any devotional services during paid hours of work at any of its facilities, wherever situated unless and until the defendant comes forward with a plan which is in conformity with Title VII of the Civil Rights Act of 1964, as amended, and is approved by this Court.

IT IS FURTHER ORDERED requiring defendant to modify its Employee Handbook to conform with this order.

IT IS FURTHER ORDERED requiring the defendant to inform all current employees within twenty (20) days of the entry of this order and any new employees or applicants for employment at their initial interview that attendance at religious services will not be required by the defendant.

IT IS FURTHER ORDERED requiring the defendant to post notices at each of its facilities in English and Spanish within twenty (20) days of the entry of this order, for two (2) years, which state as follows:

NOTICE TO ALL EMPLOYEES

This notice is given pursuant to an order of the United States District Court for the District of Arizona.

Townley Manufacturing is prohibited from continuing its mandatory weekly devotional services.

You are not required to attend devotional services at the plant. No adverse action may be taken against you for not attending devotional services.

You are advised that religious discrimination is against federal law (Title VII of the Civil Rights Act of 1964, as amended). Should you have a claim of religious discrimination concerning your employment, you are entitled to seek assistance from the United States Equal Employment Opportunity Commission.

You have the right to file a charge with the Equal Employment Opportunity Commission if you feel you have a claim of religious discrimination. No action may be taken against you by management officials or any of its employees for filing a charge.

Federal law requires that there be no discrimination against any individual, employee, or applicant for

employment because of that individual's religion, with respect to hiring, firing, compensation, or other terms, conditions, or privileges of employment.

IT IS FURTHER ORDERED requiring the defendant to post a copy of this order at each of its facilities, in a prominent place frequented by its employees.

IT IS FURTHER ORDERED that the defendant allow representatives of the plaintiff, upon reasonable notice, to inspect the defendant's premises, review the defendant's records, interview defendant's employees and otherwise conduct a review of defendant's employment practices in order to ensure compliance with this order.

IT IS FURTHER ORDERED requiring defendant to enclose copies of the above-mentioned notice with pay checks of each employee for four (4) consecutive pay periods beginning the first pay period following the entry of this order.

IT IS FURTHER ORDERED requiring defendant to report to this Court within twenty (20) days of the entry of this order the specific measures that it has taken at all of its facilities to comply with this order.

IT IS FURTHER ORDERED awarding plaintiff, Equal Opportunity Commission, its costs and attorney's fees for bringing this action for contempt.

DATED this 20th day of, April 1988.

/s/ Earl H. Carroll
EARL H. CARROLL
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV-86-1156-PHX-EHC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

TOWNLEY ENGINEERING & MANUFACTURING CO.,
Defendant.

JUDGMENT ON DECISION BY THE COURT

[Filed Apr. 21, 1988]

This action came on for trial before the Court, the Honorable Earl H. Carroll, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED granting judgment in favor of defendant and against plaintiff on the constructive discharge claim;

FURTHER ORDERED & ADJUDGED granting plaintiff's motion for contempt of this Court's order of May 11, 1987

FURTHER ORDERED & ADJUDGED that defendant pay fine of $10,000.00 to the Clerk of the Court for the United States District of Arizona for failure to com-

ply with the Court's order of May 11, 1987; such fine to be paid 20 days from entry of this order;

FURTHER ORDERED & ADJUDGED that defendant and its chief executive officer pay a fine of $10,000.00 for any subsequent violation of this order to the Clerk of Court for the United States District of Arizona;

FURTHER ORDERED & ADJUDGED that defendant is enjoined from having any devotional services during paid hours of work at any of its facilities, wherever situated, unless and until defendant comes forward with a plan which is in conformity with Title VII of the Civil Rights Act of 1964, as amended, and is approved by this Court; and

FURTHER ORDERED & ADJUDGED awarding plaintiff its costs and attorney's fees for bringing this action for contempt.

DATED at Phoenix, Arizona, this 21st day of April, 1988.

By: /s/ June Houanie
RICHARD H. WEARE
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-2566

DC# CV-86-1156-EHC
Arizona (Phoenix) x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

TOWNLEY MANUFACTURING COMPANY,
Defendant-Appellant.

ORDER

[Filed Apr. 26, 1988]

Before: SNEED and NOONAN, Circuit Judges

Appellant's motion to have this emergency motion for a stay pending appeal heard by the same panel that is assigned to appeal no. 87-2272 is granted. The emergency motion for a stay pending appeal of the district court's order of April 21, 1988 is granted without prejudice to the motion being reconsidered and the stay being lifted not later than April 29, 1988. Should the stay not be lifted within that period, it shall remain in effect until further order of this court.

M. Orders 4/25/88

APPENDIX G

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

RELEVANT PORTIONS TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED

Section 701, 42 U.S.C. 2000e(j)

DEFINITIONS

Section 701. For the purposes of this title—

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 702, 42 U.S.C. 2000e-1

EXEMPTION

Section 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Section 703(a), 42 U.S.C. 2000e-2(a)

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706, 42 U.S.C. § 2000e-5(f)(1) & (3)

PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES

Section 706(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection *(c) or (d)*, the Commission has been unable to *secure from the respondent a conciliation agreement acceptable to the Commission*, the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commisison shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed*

by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the *Commission*, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

* * * *

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any

judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.